UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UMG RECORDINGS, INC., ET AL, Plaintiffs,	:	
vs.	:	Case Number: 1:17-CV-00365-DAE
GRANDE COMMUNICATIONS NETWORKS, LLC, ET AL, Defendants.	:	Austin, Texas November 1, 2022

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TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE DAVID A. EZRA
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:
FOR THE PLAINTIFFS:

Andrew H. Bart, Esquire
Jacob Tracer, Esquire
Jenner & Block, LLP
1155 Avenue of the Americas
New York, NY 10036
(212)891-1600; abart@jenner.com

Robert B. Gilmore, Esquire
Philip J. O'Beirne, Esquire
Stein Mitchell Cipollone Beato & Missner LLP
1100 Connecticut Avenue, NW, Suite 1100
Washington, DC 20036
(202)601-1589; rgilmore@steinmitchell.com

Paige Arnette Amstutz, Esquire
Scott, Douglass & McConnico, LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701
(512)495-6300; pamstutz@scottdoug.com

FOR THE DEFENDANTS:

Richard L. Brophy, Esquire
Zachary C. Howenstine, Esquire
Mark A. Thomas, Esquire
Margaret R. Szewczyk, Esquire
Armstrong Teasdale, LLP
7700 Forsyth Boulevard, Suite 1800
St. Louis, Missouri 63105
(314)621-5070
rbrophy@armstrongteasdale.com
zhowenstine@armstrongteasdale.com
mathomas@atllp.com
mszewczyk@armstrongteasdale.com

COURT REPORTER:
Angela M. Hailey, CSR, CRR, RPR, RMR
Official Court Reporter, U.S.D.C.
262 West Nueva Street
San Antonio, Texas 78207
Phone(210)244-5048
angela_hailey@txwd.uscourts.gov

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I N D E X

(Tuesday, November 1, 2022, 9:07 a.m.)

* * *

COURT SECURITY OFFICER: All rise.

COURTROOM DEPUTY CLERK: Austin, 17-CV-365, UMG recording et. al., versus Grande Communications Network, Inc.

THE COURT: Counsel, you can be seated. The Court would note the presence of all counsel, the absence of the jury. I have had my law clerk or -- I don't know whether Priscilla did it or Alison did it, somebody did it -- give you a copy of what I consider to be the final jury instructions. Okay? So you have those?

MR. BROPHY: Yes, Your Honor.

THE COURT: I have one more thing I want to put on the record, and it has to do with the 412 issue, so I'm going to do that right now.

Over the weekend, the Court received supplemental briefing on the issue of 17 U.S.C. 412, which authorizes statutory damages for the work only if the work was first infringed after the effective date of registration or a work was infringed after first publication before registration so long as registration occurred within three months of publication.

Now, plaintiff's case is based on 1,422 sound recordings. In their briefing, plaintiffs allege that they have introduced conclusive evidence that 1,409 of their sound

recordings meet the 412 criteria. Now, to show publication and registration dates, plaintiffs rely on PX 20 through 24, which are the actual registration certificates for the sound recordings organized by the company that issued the sound recordings. They were introduced through fact witnesses.

Now, to show the first and last date of infringement, plaintiffs rely on PX 459, which was admitted into evidence. And that was checked. We checked the transcript over the weekend. PX 459 is a chart compiled by plaintiff's expert, Dr. Bardwell, using a computer program to organize the infringement notices associated with the songs asserted in this case. It would be burdensome to ask the jury to comb through each individual registration certificate for the 4,022 sound recordings and compare it with PX 459 to determine the eligibility for statutory damages of each sound recording. Additionally, this is a straightforward matter of dates in this Court's view.

As on summary judgment in the Sony versus Cox case where the judge ruled that a number of the recordings were not eligible as a matter of date, it is appropriate here for the Court to make the same ruling. Having reviewed the evidence, the Court has found a total of 31 recordings which do not meet the 412 requirements and for which the jury could not reasonably find that those requirements are met. This includes the 13 that plaintiffs conceded did not meet the requirements,

along with the additional six that defendants challenged in their supplemental briefing.

For many of these recordings, the problem was that there were multiple registration dates. And having reviewed the testimony of the experts in the case, there was no information provided that would help the jury determine which of those dates apply to statutory damages. Accordingly, the instructions have been updated to change 1,422 sound recordings to 1,391 sound recordings. These 1,391 are eligible under section 412 as a matter of law because there has not been any evidence whatsoever to challenge their eligibility.

So that is that ruling. No further argument.

MR. BART: Just a clarification?

THE COURT: Oh, the great clarifier.

MR. BART: The concern is that these are still works in suit. They're just works in suit that were not eligible for statutory damages, Your Honor, so I think --

THE COURT: But you have waived other damages in this case.

MR. BART: I understand. But in terms of proving infringement, they are still works in suit. We're just not entitled to damages on them.

THE COURT: That's correct.

MR. BART: So I think it should say that --

THE COURT: There were two registrations, not no

registrations.

MR. BART: On a couple of them, that's true, but I think the jury instruction says that we contend that they're liable for the unauthorized distribution of 1,391. They are liable for 1,422, but we are only entitled to damages --

THE COURT: Well, we might be able to modify that to reflect that -- yeah. We can work on that.

MR. BART: All right. Thank you.

THE COURT: All right. Now --

MR. THOMAS: Your Honor, I beg your pardon, if I might.

THE COURT: Don't try to argue with me.

MR. THOMAS: I'm not arguing.

THE COURT: This was a long weekend's worth of hard work.

MR. THOMAS: Understood, Your Honor. And I understood the Court has ruled on this. Two things. One would be can we get the identification -- and forgive me if I haven't seen it yet -- of the songs that are no longer eligible?

LAW CLERK: I can give that.

THE COURT: Yes. She has them.

MR. THOMAS: And I don't know if that has to be immediate.

THE COURT: She has them.

MR. THOMAS: Oh, very good.

LAW CLERK: I have them. I have one for each.

MR. THOMAS: And I believe we're on record already from Friday as far as our position on this.

THE COURT: I would say that from Friday to probably the Friday before, probably from the very beginning of this case with Judge Yeakel, okay. So, you know, at some point the Court has to make a decision. I try to make the very best decision I possibly can. My job is to try to find the law -- we don't have a Fifth Circuit case directly on point. We just don't. If we did, it would be easy, but we don't. So I have to extrapolate and look at other decisions from other Circuits and District Courts and make the very best decision I can make. My job is to attempt to make the same decision I believe the Fifth Circuit would make if they were deciding this case. Just like the Fifth Circuit's job is to attempt to make the very best decision they can make which they believe would comport with Supreme Court precedent.

So that's the way it is. And, you know, like any other case, there are going to be people who are happy, somewhat happy, and people who are not happy at all, and that is the way it is. So we just can't go on forever arguing about this because we don't have either the time nor the resources.

MR. THOMAS: Understood, Your Honor. Just for the sake of the record, I was just going to state that we stand on our previous objections to this and to the compilation issue,

and that's -- I'm merely making that presentation. I'm not arguing at all.

THE COURT: That has already been argued. You've already made your point. I don't know how many times we need to make that and put that on the record.

MR. THOMAS: Understood, Your Honor. Thank you.

THE COURT: Okay. Now, what is going on?

MR. HOWENSTINE: Good morning, Your Honor. One housekeeping thing. We're going to play two deposition videos. Those are going to be the first pieces of evidence presented today. We had one housekeeping thing on an exhibit. We're moving DX 22 into evidence. The parties have agreed on redactions. I understand there's no objection.

THE COURT: All right. Is that right, Mr. Bart, or whoever?

MR. GILMORE: That's correct.

THE COURT: I don't know who's up at bat.

MR. BART: I had to delegate the deposition.

THE COURT: Yes, that's fine.

MR. HOWENSTINE: So we have two --

THE COURT: Just a minute, please.

COURTROOM DEPUTY CLERK: Can you ask him if that's -- do we have that one already? I don't think we have that.

THE COURT: Do we have that?

MR. HOWENSTINE: We're going to e-mail it to you.

COURTROOM DEPUTY CLERK: I just want to make sure -- okay, so I need to delete the one we have. Okay.

THE COURT: Okay.

MR. HOWENSTINE: Then, Your Honor, we have two deposition videos to play. Those total about 15, 20 minutes between the two of them, and then we understand that plaintiffs may call a rebuttal witness. That's the state of affairs for the morning.

THE COURT: They say they are, and I assume it's the doctor.

MR. BART: Yes.

THE COURT: And I've already ruled on that.

MR. BART: Yes.

THE COURT: Now, when you call her, you must, Mr. Bart, limit -- or whoever -- who is doing it?

MR. O'BEIRNE: I will be, Your Honor.

THE COURT: All right, sir. You must limit yourself very carefully to the testimony that was elicited on cross. This is not an opportunity to launch off into some other area you might have forgotten to get into or would like to get into, all right?

MR. O'BEIRNE: Understood, Judge.

THE COURT: Okay. Well, everybody says they understand that, but it never happens. Okay.

All right. Yes, sir.

MR. BROPHY: I think we're ready to begin, Your Honor.

THE COURT: Okay. By the way, you know today I have to go back -- after court today -- off the record.

(Discussion had off the record.)

* * *

COURT SECURITY OFFICER: All rise for the jury.

(9:18 a.m., the jury enters the courtroom.)

* * *

THE COURT: Okay, please be seated. By way of information, ladies and gentlemen, you know how -- I'm so transparent, I feel like a ghost up here, you know.

What's happening is we will have a full day here today one way or the other, but what's going to happen is that counsel are going to be putting on some additional testimony. When they're done with their -- defendants, okay, when they're done with their testimony, then there's going to be a very brief rebuttal case by the plaintiff. They have the right to do that because they carry the burden of proof, and they will put one witness on. Shouldn't take long. And when that is done, the Court is going to instruct you on the law, and we're going to go right into closing arguments. We're that close.

Now, you're going to start your deliberations, I am hopeful either late this afternoon or first thing tomorrow morning. Now, you should know that I have to go back to San Antonio this afternoon after court because I've got some things

I've got to do there, but I'm going to turn right around and come back on Wednesday, which is tomorrow afternoon. By then you should be deliberating anyway, okay? But just in case, if you were to send a note out in the morning or something, I won't be here, so don't do it. Wait. And then, of course, I'll be here all day Thursday. And if you're still deliberating and haven't reached a verdict by Thursday, we have a problem because I will not be here on Friday. I cannot be here on Friday.

Now, you can continue to deliberate on Friday, but I will not be here. Now, we have a problem, because I have been with this case for so long, and there are so many legal issues, that I really can't have another judge come in and answer the jury questions. It would be impossible to do, so what would happen is if you were to reach a verdict on Friday, then I could -- and there's no question, just reach a verdict, then I will talk to the lawyers. We can probably have another judge just receive the verdict. Although I would like to be here for that, but, you know, if it happens, it happens.

If you don't reach a verdict by Friday, you will come back on Monday. Okay? This is a little different than what we've been doing. And the reason we can do that is because, obviously, we don't need to be in court, and I don't need to be here in front of you. I can be doing my other things that I need to be doing and I can skedaddle up here if I need to.

Okay? All right.

Okay, counsel, are you ready?

MR. HOWENSTINE: Yes, Your Honor.

THE COURT: All right.

MR. HOWENSTINE: Grande calls by videotaped deposition Jonathan Glass, corporate representative of Warner Music Group who was deposed on November 9, 2018 and October 26, 2022.

(Videotaped deposition playing.)

* * *

(JONATHAN A. GLASS, Witness, Sworn.)

COURT REPORTER: *Can you please state your full name for the record?*

THE WITNESS: Sure. Jonathan A. Glass.

EXAMINATION

BY MR. HOWENSTINE:

Q. What is your current position?

Well, before I get to that, who is your employer?

A. Warner Music Group.

Q. And what is your current position and title?

A. I am senior vice president, digital legal affairs, yes.

Q. In your role with the company, do you have any involvement in antipiracy efforts?

A. I do.

Q. And what is the nature of that involvement?

A. I generally give, you know, legal advice in connection with

antipiracy issues that we face.

Q. Are you familiar with a company called Rightscorp?

A. I am.

Q. And what is your understanding of the nature of Rightscorp's business?

A. From what I understand, Rightscorp is a service provider that identifies infringing content on BitTorrent networks and sends DMCA takedown notices on behalf of copyright owners whose intellectual property is being infringed.

Q. Warner has never hired Rightscorp to perform any services on its behalf, correct?

A. Correct.

Q. When did Warner first become aware of Rightscorp, formerly Digital Rightscorp?

A. A number of years ago. I'm not sure how long ago, in particular.

Q. Do you have knowledge of specific efforts by Rightscorp to market its services to Warner?

A. I know that -- in one instance, they tried to do so.

Q. Roughly when did this occur?

A. I don't recall.

Q. In the last five years?

A. Likely.

Q. And who is it that you understand Rightscorp reached out to within Warner?

A. Paul Robinson, our general counsel.

MR. GILMORE: Counsel, Mr. Glass has some more information he'd like to add regarding some of your prior questions.

BY MR. HOWENSTINE:

Q. Go right ahead. Surprise me.

A. So I spoke to Mr. Robinson about the time that he was contacted by Rightscorp that we discussed. Mr. Robinson said that Rightscorp was reaching out. They were in some financial difficulties, wanted to sell us data to be able to use in infringement cases against ISPs. And they made a proposal, and we rejected that proposal and did not hire Rightscorp -- or did not, excuse me, accept their offer for data.

Q. When did you first become aware that Rightscorp had been retained by the RIAA in connection with this case?

A. In my deposition preparation.

Q. So within the last week?

A. Uh-huh.

BY MR. THOMAS:

Q. Mr. Glass, hello?

A. Hello.

Q. Mr. Glass, you understand you're here to testify on behalf of Warner?

A. The Warner plaintiffs, yes.

Q. Okay. On what topic do you understand you're here to

testify?

A. I understand I'm supposed to testify about the document in question and the Warner plaintiff's knowledge of that document.

Q. Are you prepared to testify as to the document you're referring to on behalf of the Warner plaintiffs?

A. I am.

Q. Can you tell me what you did -- once again tell me what you did to prepare?

A. I spoke with my lawyers, I looked at my deposition testimony, and I looked at the document in question that was an exhibit to -- that I was just -- that I was asked about at my deposition.

Q. Mr. Glass, who is Howie Singer?

A. Howie Singer is a former employee of Warner -- of Warner Music.

Q. Is it correct that Mr. Singer was responsible for antipiracy, or at least digital antipiracy while he was at Warner?

A. He was. That was one of his responsibilities.

Q. Got it. And do you recall having testified previously that Mr. Singer would sometimes pull e-mails or send around articles about antipiracy topics?

A. Yes.

Q. All right. I've put up on the screen what in your prior deposition was marked as Glass Exhibit 8. Can you see it

there, Mr. Glass?
A. I can.
Q. Do you recognize this document?
A. I do.
Q. Is this a document that you reviewed in preparation for this deposition today?
A. Yes, this is the document I reviewed.
Q. So, Mr. Glass, this document that we're looking at is an e-mail from Howie Singer to Howie Singer dated September 30, 2015, correct?
A. That's what it says, yes.
Q. And I believe you said that Mr. Singer had a practice of sending around articles to the team that related to antipiracy; is that correct?
A. I did say that, yes.
Q. And this particular e-mail has the text that's apparently been cut and pasted from an article, correct?
A. Oh, I don't know.
Q. Do you agree that the subject line relates to Rightscorp?
A. It's regarding Rightscorp.
Q. Mr. Glass, do you see that the subject -- the text of the subject line relating to Rightscorp is copied into the body of the e-mail as well?
A. Yes.
Q. And then there is -- there are several paragraphs, about

five paragraphs of text, relating to Rightscorp. Do you see that?

A. Yes.

Q. Is it your understanding, Mr. Glass, that this is an e-mail that Mr. Singer sent to himself containing text relating to Rightscorp?

A. That's what the e-mail says, yes.

Q. Do you agree, Mr. Glass, that this article in Mr. Singer's e-mail casts Rightscorp in a very negative light?

A. It's critical of Rightscorp.

Q. So what I'm asking is, Mr. Glass, do you agree that this article has allegations that are critical of Rightscorp's business practices?

A. Yes.

Q. Mr. Glass, do you agree that Mr. Singer saw this article and felt it was significant enough that he copied it?

A. Yeah, I don't know if he thought it was significant enough. He sent this e-mail to himself. That's all I know.

(Videotaped deposition stopped.)

* * *

MR. HOWENSTINE: Grande next calls by videotaped deposition Christopher Sabec of Rightscorp. Mr. Sabec was deposed on August 7, 2018.

(Videotaped deposition of Christopher Sabec playing.)

EXAMINATION

BY MR. BROPHY

A. I'm founder of Rightscorp, and we began Rightscorp in January 2011. January 21st, 2011, I believe.

Q. So let's break that down a little bit. During what periods of time?

A. I believe -- I'm not totally sure of the years, but from the founding of the company until February 20, I want to say 2016, I was CEO.

Q. Has there ever been a relationship, a contractual relationship, between Rightscorp and any plaintiff in this case?

A. No.

Q. So is it fair for me to say that no plaintiff has ever approached Rightscorp and asked Rightscorp to monitor any of the copyright properties that it owns?

A. Can you rephrase that?

Q. Well, is it fair for me to assume that, because there is no contractual relationship between Rightscorp and any plaintiff in this case, that no plaintiff has ever asked Rightscorp to send notices on its behalf?

A. Correct.

Q. I understand that Rightscorp has provided certain data to RIAA in relation to this case. Is that correct?

A. Correct.

Q. That data existed before there was ever any relationship

between RIAA and Rightscorp, correct?
A. Correct.
Q. And that data was not gathered at RIAA's request, correct?
A. Correct.
Q. And it was not gathered in the plaintiff in this case's request; is that correct?
A. Correct.
Q. So it sounds like other than Robert Steele's potential recollection, there is no evidence that we can identify of an instance in which an ISP has been able to verify the Rightscorp notices; is that correct?
A. I would say a more accurate way is there's no instances of an ISP ever being able to identify an inaccurate notice.
Q. Well, that's kind of a different side of the same coin, right? Either there's an ability to verify that it's correct or not, or there isn't an ability to verify that it's correct or not. And I'm trying to figure out is there any evidence that you can point me to of an ISP being able to determine, one way or another, whether the notice is accurate or inaccurate?
A. No.
Q. Is it fair for me to say that the process you just described of identifying a file being made available from an IP address, that Rightscorp, through that process, has not actually detected anyone duplicating the file or downloading the file; you just detect that it is available for download.

Is that fair to say?

A. We don't monitor -- we choose not to monitor for downloads.

Q. I'd like to talk a little bit about auditing. Does Rightscorp employ any firm that audits its source code or processes to make sure that those source code and processes are working correctly?

A. I think you should bring that up with Greg.

Q. You're not aware of any auditing that's performed by Rightscorp?

A. No.

Q. We were discussing before the lunch break that Rightscorp closed down its Call Center. If a subscriber receives a notice and wants to ask a question or believes that the notice was sent incorrectly, what would they do? How would they complain to Rightscorp about that?

A. I guess they would do it by e-mail now.

Q. And I believe your testimony was you don't know who checks that e-mail in-box anymore; is that right?

A. Correct.

Q. Are you aware of any opportunity that an accused infringer has to appeal a Rightscorp determination or speak to some independent party to have the -- to challenge the notice that's been sent to them?

A. While we had the Call Center running, they would contact the Call Center, and then they would talk about it.

Q. But the Call Center was run by Rightscorp employees, right?
A. Correct.
Q. So is there any way for a subscriber who's accused by Rightscorp of conducting an infringement to turn to someone other than Rightscorp to have that allegation independently assessed -- that you're aware of?
A. Not that I'm aware.
Q. And you're aware of people who have called into Rightscorp's Call Center and said that they didn't do what the notice alleges they did, right?
A. Yes.
Q. So with all of that said, Exhibit 9, which has Bates numbers BMG Grande 968 through 972, Mr. Sabec, have you seen this document before?
A. I believe I have.
Q. What is this document?
A. I believe it's a copy of the script that the agents used out of some program. We printed it -- they used a program on their computer, and this is like a printed version of it.
Q. Okay. Is this a script that the Rightscorp Call Center would use when it received phone calls from subscribers accused of copyright infringement?
A. At some point in time, yes.
Q. I'll hand you what's been marked as Exhibit 11. Exhibit 11 has Bates numbers Rightscorp 5717 through 5746. Have you seen

this document before?
A. Yeah, this looks familiar even -- this does look familiar to me.
Q. What is this document?
A. This is a -- like, a better printout of the script.
Q. And this has a date on it, right? October 23rd, 2014; do you see that --
A. Yes.
Q. -- at the very top?
A. I'm not -- I'm not sure if that's when this was produced or when it was done. I don't know. I guess that must be the name of the file, right?
Q. That's my understanding.
A. Yeah, it's probably -- it looks like a file name.
Q. All right. So is this a version of the Call Center script that was used roughly during that time period for Rightscorp? I'm sorry, was that a yes?
A. Yes.
Q. Does Rightscorp have a position on what ISPs should do when they receive the notices that Rightscorp sends?
A. They should verify in the way they feel comfortable of verifying, and if it's accurate, they should send it -- they should forward it.
Q. Does that include forwarding the information about the -- including the pay link or just the notice without the pay link?

A. We'd prefer that they send the pay link.
Q. Is it Rightscorp's position that ISPs should terminate subscribers permanently after receiving two Rightscorp notices for that IP address?
A. No.
Q. What about if they receive five notices?
A. No.
Q. Does any human, lawyer or otherwise, review the notices that Rightscorp prepares before they are transmitted to an ISP or subscriber?
A. No.
BY MR. O'BEIRNE:
Q. Are you aware of any time where Grande reached out to Rightscorp and indicated that it had contacted one of its own customers and the customer had disputed in any way the contents of a Rightscorp notice?
A. No.
MR. BROPHY: Objection. Calls for speculation.
BY MR. O'BEIRNE:
Q. So the answer is no, you're unaware that that ever happened, correct?
A. Correct.
Q. And is it fair to say you're unaware, sitting here today, of a single instance of a false positive notice from Rightscorp?

A. I'm unaware, sitting here today, of any notice -- any false positive notice that's been brought to our attention.

(Videotaped deposition stopped.)

* * *

MR. HOWENSTINE: Your Honor, Grande moves to admit into evidence DX 58 and 59 that were addressed in that deposition testimony.

MR. O'BEIRNE: No objection.

THE COURT: Be received.

MR. BROPHY: Your Honor, with that, Grande Communications rests its case. Thank you.

THE COURT: Thank you, counsel.

MR. O'BEIRNE: Your Honor, plaintiffs call Barbara Frederiksen-Cross.

THE COURT: Ma'am, you can just be seated, and I would remind you that you remain under oath.

THE WITNESS: Thank you, Your Honor.

EXAMINATION

BY MR. O'BEIRNE:

Q. Good morning, Ms. Frederiksen-Cross.

A. Good morning.

Q. How are you?

A. Good.

Q. You were here in the courtroom for Dr. Cohen's testimony, Grande's expert, in this case; do you recall that, ma'am?

A. Yes.
Q. There were some topics that Dr. Cohen talked about, some testimony he gave, that I specifically want to ask you about and get your reaction to.
MR. O'BEIRNE: Can you pull up the demonstrative, please.
BY MR. O'BEIRNE:
Q. The first thing I'm going to ask you about: Do you recall the testimony that Dr. Cohen gave when he sat at counsel table and pulled up the code of the Rightscorp system and talked about specific SQL entries or parts of the code that talked about *"do not preserve"*; do you recall that?
A. Yes, I do.
Q. And specifically do you recall a question from Grande's counsel, *"He put language in there to guarantee that there would be no logging of this behavior"*?
A. Yes.
Q. And do you recall Dr. Cohen's answer: *"Yeah, he explicitly must have added that directive to make sure that this event would not be logged in what's called the event table."*
Do you see that?
A. Yes.
Q. Do you agree with that assessment by Dr. Cohen?
A. No, I do not.
Q. Why not? Please explain to the jury.

A. First of all, when we do an event in MySQL, the language involved here --

MR. BROPHY: Your Honor, I'll object. It's outside the scope of her expert reports.

MR. O'BEIRNE: Your Honor, it's squarely within her rebuttal reports about --

THE COURT: Objection's overruled.

A. When you code an event in MySQL, the default behavior for an event is that it not log the event. The event is dropped when it's done. And that's normal behavior, because on a routine, something you're running every few hours or every few minutes or whatever, you don't need to see a whole list of log entries saying I ran, I ran, I ran, I ran. And that's documented, as I show here in the documentation, for the MySQL reference manual. You'll see it says, *"Using 'ON COMPLETION [NOT] PRESERVE' merely makes the default non-persistent behavior explicit."*

So all he's saying is saying, I'm taking the default behavior.

Q. I think you just explained it, but this information on this slide comes from where?

A. It comes from the MySQL Version 5.7 Reference Manual in a section called *"13.1.12 CREATE EVENT Statement."*

Q. And do you agree with the statement there that "COMPLETION [NOT] PRESERVE" is merely the default setting of a SQL event?

A. Yeah. And it's been that way for a long time.

MR. O'BEIRNE: Next slide, please.

BY MR. O'BEIRNE:

Q. As part of that testimony in going through the code, do you recall Dr. Cohen describing certain tables that are cleared that had bit field information in them?

A. Yes.

Q. And he offered the opinion that that information was important to retain as part of Rightscorp's identification; do you recall that?

A. That was his opinion, yes.

Q. Do you agree with that?

A. I do not.

Q. And do you have some examples in the code of why you disagree with Dr. Cohen's opinion?

A. Yes.

Q. Could you please walk the jury through these examples of the code starting with the top left corner?

A. Okay. This is an example from the 2013 code, this same code with very little changes present in the 2015 code and the 2018 code.

So what we see in the top left-hand side, this is where that bit field is interrogated. So after a peer has handshaked with the Rightscorp system and sends its bit field, this little bit in the yellow here, you're looping through those bits in a

bit field one at a time and you're checking to see if they're all ones. And any of them -- if any of them is a zero, you set this flag full load equal false. And that flag is important, because -- as we'll see as we walk through this code -- that flag is what gets interrogated when you're preparing to send a notice. And so because you've got the flag, there's no need to keep the entire bit field.

Q. And is this process automatic when the bit field information comes from the other user?

A. Yeah, it's just a part of the code. There's no way to bypass it. It's just that's how the code works to check the bit field.

Q. So is it your opinion that this part of the code is automatically recording what bit field information the peer has given to Rightscorp?

A. Yes -- well, it's automatically recording whether it received a full bit field or not.

Q. And is it your opinion that the code can do so accurately and reliably?

A. Yes.

Q. And then what is the next portion of code?

A. This program that does the detection passes both the bit field information and the full load, as I've highlighted here, to the next piece of code, which will take that and record it in the database.

Q. And so you've got the language here *"Transferring."* Is it your opinion that the code is transferring the bit field information it analyzed in this first portion to the next step in the code?

A. Yeah, this is in the same program a little bit further down in the program where it's packaging all that up so it can be sent to the program that does the write to the database.

MR. O'BEIRNE: Next slide, please.

BY MR. O'BEIRNE:

Q. And then in the upper left-hand corner, what's the next portion of the code you'd like to explain to the jury?

A. Well, you can see at the top here, line 113, this is preparing to insert data into the torrent infractions database, and so what you see is it's picking up those values that were passed in from the other program. So this is in the next program, *"detected JSP,"* that the infringement finder communicates with in order to save this in the database.

Q. And will it only pass this information along if there was 100 percent of the bit fields in the analysis that we first looked at?

A. Yes.

Q. So in your opinion, is the bit field information being transferred through the code accurately?

A. Yes.

Q. And then the last step in the code, bottom right-hand

corner, what does that signify?
A. This is selecting data from that torrent infractions table, then, that was passed across. And here the file, the full load is called *"full file,"* but it's the same file; the full load gets put in that data value. And it's selecting the data out of the torrent infractions. And you see that it's testing to see if the full file equals one. That's the value that's true. That means that there was the full bit field, and it's putting that data, then, into -- you see at the bottom on that one -- into the expanded TI table, and that's the table that eventually the actual records are drawn from when you get ready to prepare a notice.

So there's a couple of steps after this where that data is pulled out then and extracted and then merged in with a notice and sent to the ISP.

Q. And is this process also automatic?
A. Yeah. It's all part of the code. It just steps through it.
Q. So is there any way in the code that we've just looked at that a notice could be generated without this automatic checking for a hundred percent bit fields?
A. Not in this code.

MR. BROPHY: Objection. That's testimony that we've already heard in her direct examination earlier in the case.

THE COURT: I think so. My recollection is -- the

objection is sustained.

MR. O'BEIRNE: Fair enough, Your Honor. I'll move on.

BY MR. O'BEIRNE:

Q. Dr. Cohen testified it was his opinion that it's important to retain the bit field information even though this code exists. Do you agree with that?

MR. BROPHY: Your Honor, she has already testified in her direct in the original case that it was not important to obtain bit field information. This is the same testimony we've already heard.

MR. O'BEIRNE: Your Honor, it's in light of his testimony specifically about the tables that were clear on the --

MR. BROPHY: The rebuttal case is not about getting the last word.

THE COURT: Objection is sustained.

BY MR. O'BEIRNE:

Q. All right, Ms. Frederiksen, let's move on to another topic that Dr. Cohen talked about.

A. Sure.

MR. O'BEIRNE: Pull up DX 68, please.

BY MR. O'BEIRNE:

Q. Do you recall Dr. Cohen's testimony about this document, ma'am, a statement of work from another project between the RIAA and a different monitoring company?

A. I do.
Q. Do you recall Dr. Cohen's testimony about this?
A. Yes.
Q. Without getting into details, are you familiar with the MarkMonitor system and the kind of data it collects?
A. Yes, I am.
MR. BROPHY: Your Honor, this is getting into another case.
MR. O'BEIRNE: Your Honor, he put this exhibit up and had Dr. Cohen talk all about it.
MR. BROPHY: He's asking her about whether she knows about the MarkMonitor system, which is not something that we went into with Dr. Cohen.
MR. O'BEIRNE: I'm just saying generally, Your Honor. I won't ask her any more about the MarkMonitor.
THE COURT: Why ask it at all? The objection is sustained.
MR. BROPHY: Thank you, Your Honor.
BY MR. O'BEIRNE:
Q. Let's turn to page three of this document. Do you see where it says *"supporting file-sharing networks"*?
A. Yeah. Can you blow it up? Thank you. Oops, we've lost it.
Q. And Ms. Frederiksen, I'd like to ask you some questions about Dr. Cohen's testimony and your reaction to it about this

document, but first I want to point you to the "*supporting file-sharing networks*" paragraph. Do you see that?

A. Yes.

Q. What do you understand this to be describing as far as what this statement of work is talking about?

MR. BROPHY: Your Honor, this is outside the scope of her expert reports. Her expert reports say these documents are irrelevant. She's not expressed any opinions on any of these materials.

MR. O'BEIRNE: Paragraphs 27 through 54 of her supplemental rebuttal report discusses Dr. Cohen's opinions about what should have been retained vis-á-vis this article.

THE COURT: Yeah, but this is not just Dr. Cohen's opinions in his report. This is Dr. Cohen's testimony.

MR. O'BEIRNE: Exactly.

THE COURT: So where -- did he testify about this?

MR. O'BEIRNE: Yes, Your Honor. They put up this -- they literally walked through the requirements of this document.

THE COURT: I think I remember.

MR. BROPHY: Your Honor, she has not testified to this in her expert reports. It's not in.

MR. O'BEIRNE: It's not true, Judge.

THE COURT: The objection is overruled.

BY MR. O'BEIRNE:

Q. Please explain to the jury what you understand *"supporting file-sharing networks"* to be talking about in this document.
A. Well, as it says here, *"The following peer-to-peer networks will be supported as a part of the agreement,"* and it lists BitTorrent and three other peer-to-peer networks: Gnutella, eDonkey and Ares. Those are other file-sharing networks that each have their own protocol and their own set of behaviors, so this document is encompassing multiple peer-to-peer networks.
Q. So let's now turn to page ten.
MR. O'BEIRNE: Zoom in on the full content verification in the next -- the two big paragraphs.
BY MR. O'BEIRNE:
Q. Ms. Frederiksen, do you recall Dr. Cohen being shown this document and testifying about his opinions about what hash-based matching is being talked about in this document?
A. Yes.
Q. Okay. Looking at the first paragraph, do you see anything in this paragraph that would be relevant to which kind of protocol is being detected under this statement of work?
A. Yes, I do.
Q. Could you please explain to the jury how the different kinds of protocol would be reflected here?
MR. BROPHY: Your Honor, this is completely new opinion testimony that she's giving. That's nowhere in her expert reports.

THE COURT: The objection is sustained. I agree.

MR. O'BEIRNE: Your Honor, it's absolutely in her reports. They showed Dr. Cohen's --

THE COURT: It may be in her reports, but this is rebuttal testimony. The objection is sustained.

MR. O'BEIRNE: Your Honor, if I may, Dr. Cohen was shown this hash-based verification paragraph and asked what it means, and it referenced the paragraph above, and Ms. Frederiksen is going to give testimony rebutting Dr. Cohen's characterization of this exact paragraph.

MR. BROPHY: This is brand-new testimony that she has never put in her expert reports and we're hearing for the first time in the eleventh hour in this case with no ability to react to it.

MR. O'BEIRNE: Judge, this is not true. These facts were raised for the first time in Dr. Cohen's case in chief.

THE COURT: All right. I'm going to revise my ruling. Objection is overruled.

BY MR. O'BEIRNE:

Q. Looking at this first paragraph, Ms. Frederiksen, what relevance does the fact that this could be detecting other kinds of file-sharing protocols than BitTorrent have?

A. Well, the other three protocols are principally whole file protocols, or at the time of this document they were. Two of them still are. And they don't have the use of a file like a

torrent file that is used to authenticate their content. So in that context, in order to verify what a download is, different behaviors are required for the different networks. And you can see at the end of this paragraph that they make a specific carve-out for a different behavior for BitTorrent.

MR. O'BEIRNE: Could you highlight there starting *"the complete torrent data."*

BY MR. O'BEIRNE:

Q. Is this what you're referring to, ma'am?

A. Yeah, that section of the paragraph is different than the section above. The section above they're talking about downloading the file and creating a hash of the file. But in this section they say the complete torrent data should be downloaded from the swarm, so downloaded from the general population of users.

And the contents, then, should be verified via digital fingerprinting. And then the hash value of the torrent should be used -- it would be helpful if we could keep that on the screen. Should be used to cross-reference and verify information for the individual use cases. So for use cases where you're talking to an individual peer, use that hash value, the info hash value, to validate what they're exchanging.

Q. Does Rightscorp do that?

A. Yeah, yeah.

Q. And looking down at the next paragraph, "*Hash-based verification*," do you recall Dr. Cohen testifying that he does not believe Rightscorp --

MR. O'BEIRNE: Can you keep it up?

BY MR. O'BEIRNE:

Q. Do you recall Dr. Cohen testifying that he does not believe that Rightscorp does hash-based verification as described in this paragraph?

A. I recall his testimony to that effect.

Q. In your opinion, is that correct?

A. No, I do not agree with it.

Q. Please explain to the jury, in your view, how Rightscorp does do hash-based verification.

MR. O'BEIRNE: Hold on. Let's just switch over. Can we switch to the ELMO?

BY MR. O'BEIRNE:

Q. Ms. Frederiksen, could you please explain to the jury in your view how Rightscorp does do hash-based verification as described in this paragraph?

A. Yeah, you see that it refers to the paragraph we were just talking about for the BitTorrent rules. So BitTorrent rules, download the torrent, identify the content, and then use the info hash in subsequent interactions with peers. And that's exactly what the Rightscorp system does.

Q. You see here it states, "*For the subsequent detected*

instances of the same file matched by the identified hash, selected respondent will download enough of the file to be able to record the source and destination and to prove that the user was offering the file, that the user is a valid P2P user, and also to verify that the file is a valid P2P file."

Do you see that?

A. I do.

Q. Does Rightscorp do that?

A. Yes. Rightscorp is verifying that a user is offering the file when it performs the handshake. And because in the BitTorrent environment you have that torrent file that identifies what the user is using, there's no need to do further download beyond that handshake to be able to confirm that the user is a peer-to-peer BitTorrent user, that they're online, that they're offering that file, which is the language here, "*prove that the user was offering the file,*" and then communicate the IP address to the extent necessary. And again, that's done through the confirmation of the bit field in the case where you're using that torrent file in the handshake.

Q. You mentioned the other non-BitTorrent protocols that are also talked about in this agreement.

A. Yes.

Q. Would downloading part of the file be necessary in the -- could it be necessary in the non-BitTorrent protocols?

A. It would be, because the way that you locate those files in

a non-BitTorrent protocol is by searching through super nodes --

MR. BROPHY: Your Honor, this is also way outside the scope of any expert report she's ever shown in this case.

MR. O'BEIRNE: It's just not, Judge. It's a direct reaction to --

THE COURT: Overruled.

A. So in those instances, you would have to download the file to confirm what the file contains, because you search for something like an artist name and title, and you get back a file, but until you actually receive that file, you can't know what it is.

In BitTorrent, you've got the confirmation of what's in the file via the information that's in the torrent file that you're using to communicate with another -- with another peer.

BY MR. O'BEIRNE:

Q. So your opinion is Rightscorp does this hash-based verification?

A. Yes.

Q. A couple pages later in this document we were shown this data capture and storage. See that, ma'am?

A. Yes, I see it.

Q. And do you recall counsel went through each of these items and asked Dr. Cohen whether Rightscorp obtains and captures this information; do you recall that?

A. Yes, whether they capture it in their system.
Q. I'd like to go through with -- and get your opinion as to whether Dr. Cohen is correct as to Rightscorp retaining each of these pieces of information.
A. Okay.
Q. Does Rightscorp retain the ISP name?
A. Yes. And you can see that in the notices.
MR. BROPHY: Objection, Your Honor. This isn't part of Dr. Cohen's testimony. He wasn't talking about these elements.
MR. O'BEIRNE: He literally walked through --
MR. BROPHY: Your Honor, he went through the ones on the next page, not these.
MR. O'BEIRNE: Your Honor, it's this section of the contract. It's -- there's a list. He picked a few out of the list. I'm going through each ones.
MR. BROPHY: Your Honor, there are two distinct sections. One for information from the actual subscriber and one that isn't, and they're pointing to the one that isn't, and we focused on the one that is. So if they're going to talk --
THE COURT: This objection is sustained.
BY MR. O'BEIRNE:
Q. Let's go to the next list. Apparently, counsel concedes that Rightscorp does this.
So let's go down to the *"Log listing all steps of the*

investigation with date and time stamps." Do you see that, ma'am?

A. Yes.

Q. What's your opinion as to whether Rightscorp has that information?

A. Well, the steps of the investigation can be determined by looking at their source code. It always goes through the same steps in the investigation. And it retains the time stamp from the interaction with the peer.

Q. Okay. And then *"Log of all control communications with the target."* Do you see that?

A. Yes.

Q. In your opinion, does Rightscorp log all relevant control communications?

A. All relevant communication because it's the information that's obtained in the handshake.

Q. And which control communications did Dr. Cohen discuss Rightscorp not obtaining?

A. Choke data.

Q. Is it your opinion that retaining choke data is a relevant --

MR. BROPHY: Objection, Your Honor. This is part of her direct testimony, she addressed choke data on her direct.

MR. O'BEIRNE: It's rebutting Dr. Cohen's testimony.

THE COURT: This objection is overruled.

THE WITNESS: Sorry. Could you ask the question again?

BY MR. O'BEIRNE:

Q. Could you explain to the jury why you don't believe the choke data is a necessary control communication to obtain?

A. If you've used BitTorrent at all or if you've even just studied the protocol for BitTorrent or looked at the code, you know that every peer starts choked, whether you're giving stuff away or looking for stuff, you start choked. And then as a traffic control mechanism to control for congestion on the network, you periodically unchoke a specific number of peers, and you interact with them. And then on kind of a round-robin basis you will choke one of those peers and unchoke somebody else.

So the choke data isn't in any way indicative of whether a peer is willing to upload or download. It's only indicative of whether a peer is uploading and downloading at this exact second. And it changes, on the average, about every ten seconds. The optimistic choke changes every 30 seconds, and so it's not relevant data because it's constantly changing, and it doesn't indicate willingness to share.

Q. Is every peer offering to share on BitTorrent choking?

A. Choking and unchoking, yeah.

Q. And is everyone downloading files on BitTorrent being choked?

A. Choked and unchoked, yeah.
Q. *"Traceroute information."* Do you see that?
A. Yes.
Q. Does Rightscorp obtain that?
A. Rightscorp does not retain traceroute information.
Q. Is that important?
A. I don't think so. I mean, if you couldn't identify the ISP for some reason, then it might be helpful, but beyond that, there would be no reason to retain the traceroute information.
Q. I think you testified, but the record is clear, by IP address of the BitTorrent user, Rightscorp can obtain the ISP, right?
A. Right. You look up against the ARIN records to identify which ISP owns the IP address, so then you know who to send the notice to.
Q. Next one. *"Bit fields from the BitTorrent users."* Do you see that?
A. Yes.
Q. Is that addressed by your testimony and the code we looked at this morning?
A. Yeah, we just talked about that.
Q. And then *"Screen shots scanning the client software."* Do you see that?
A. Yes.
Q. Is that relevant to the Rightscorp system?

A. Rightscorp doesn't have a human interface to have screen shots, so that was something that they couldn't capture.
Q. "Headless" is the term we've heard?
A. Headless.
Q. It's Halloween, I guess headless is a relevant concept but --
A. It's a term of art.
Q. Right. Okay. *"Detail of the shared file list."* Does Rightscorp retain that?
A. Rightscorp sends a notice for each individual file that it's hired to protect. So if a torrent has five files it's hired to protect, it sends a separate notice for each; unlike a system that would send one notice and list all five.
Q. So one file per notice means there wouldn't be a list?
A. One file per notice means there wouldn't be a list. You could go to the database for a particular transaction ID and see the list of files associated with that detection, but it doesn't maintain a separate list in the notice it sends. It's just reflected in the database records, in association with that TC number we talked about before.
Q. And then *"peer or client ID."* Is that the TC number you mentioned?
A. No, the peer or client ID, some BitTorrent clients actually generate a peer ID as a part of their operation. And it's just used internally in that particular client. It's not -- most of

them change every time you restart the program, so it's not anything that would be persistent or valuable in identifying a user in a particular situation.

Q. And then for this last one, *"For RIAA evidence full repertoire details, the artist name and track name."* Does Rightscorp retain that?

A. Yes. Just to be clear, it does so by matching the info hash value and the specific bits against the list of works that it's hired to protect and the identification of those works, so it requires joining two tables.

Q. Ms. Frederiksen, do you recall Dr. Cohen showing this Venn Diagram reflecting his analysis of the downloads on the drive?

A. I recall that, yes.

Q. And you see there's various numbers he has there, *"Total number of downloads, 59,000,"* what he calls *"distinct infractions, unique files,"* etc., do you see that?

A. Yes.

Q. In your opinion, are there numbers that are relevant that are missing here from this Venn Diagram?

A. Yeah.

Q. What number is missing that you think is relevant?

A. For instance, the fact that 41,000 of those samples were verified through Audible Magic by Mr. Landis's work as belonging to the recording companies.

Q. And why is it your view that the 41,000 matched copyrighted

works through Audible Magic are relevant?
A. Well, it's --
MR. BROPHY: Objection, Your Honor. She's testifying about songs that aren't even at issue in this case.
MR. O'BEIRNE: It's verification of the system, Judge. It's squarely in her report, and it's rebutting his analysis as to the --
MR. BROPHY: His analysis was about copyrighted works at issue in this case.
THE COURT: The objection is sustained.
BY MR. O'BEIRNE:
Q. Ms. Frederiksen, do you believe that copyrighted works validated by Audible Magic are relevant to the reliability of the Rightscorp system?
A. Sure.
Q. Whether or not they're specifically being sued on in this case?
A. Well, yeah, because Rightscorp --
MR. BROPHY: Your Honor, getting the same testimony out by asking a different question. She's testifying about --
THE COURT: Objection is sustained.
BY MR. O'BEIRNE:
Q. Setting aside the number of files, do you recall Dr. Cohen saying repeatedly that there's downloads on this drive that are duplicates; do you recall that?

A. I recall his testimony about that.
Q. Do you recall him offering opinions as to the significance of duplicates being on this drive?
A. Yeah, he seemed to be saying that somehow the presence of duplicates on this drive should be discounted; that you should just be looking at individual instances, so that little 3,692 that he has in the middle there.
Q. Would you call any download on this drive a duplicate?
A. No. Each one was the result of the Rightscorp system going out to a peer, asking for a file, and getting at least a part of that file enough that it could be identifiable through Audible Magic, and bringing that file back.

So if I went out to you a hundred times, that's a hundred discrete instances that I went to that peer and downloaded that file. And I don't think that characterizing that as a duplicate is really fair, because each time I've gone out there, I've gotten the file again. I mean, that's a demonstration of repeat infringers.
Q. Do you believe that the fact that there are multiple copies of the same infringing work from the same user over time makes the data on this drive show the Rightscorp system is more or less reliable?
A. Well, I think it's more reliable because when it keeps going out there, it keeps getting what it's asking for, and then that file was verified through Audible Magic. So

Rightscorp verified it through AcoustID, Audible Magic verifies it here. It's a verification that the system is working as designed. It's identifying a file, going out to a peer, and then getting that information back.

Q. Would you call that repeated downloads from the same peer?

A. In the instances where it went back to the same peer, yes.

Q. What relevance do you believe repeated downloads from the same peer has for this idea from Dr. Cohen that maybe these peers are not willing to share?

A. Well, it certainly refutes some of them aren't willing to share, because they shared over and over and over. When Rightscorp went out to download the file, they gave it to them. When it went out again, they gave it to them again. That certainly suggests that those peers were willing to share.

Q. The last topic I want to ask you about, Ms. Frederiksen, is Dr. Cohen's testimony that there may be peers on BitTorrent that are lying about what they have and saying they have more bit fields than they really do. Do you recall that testimony?

A. Yes, I recall he said that you could do that.

Q. Is that consistent with your understanding of how BitTorrent software works?

A. No. I mean, I've examined a lot of different BitTorrent clients. I've looked at the source code for many of them, and I have never seen a BitTorrent client that allows an option for a user to say, I'm going to overreport the pieces I have. And

that's contrary to the whole premise of how that piece reporting is used for BitTorrent, because BitTorrent is a tit-for-tat protocol. You get preferential treatment under the BitTorrent protocol if you share with another peer.

And in contrast, if you say you have a piece and a peer asks for it and you don't give it in a reasonable amount of time, that peer breaks its connection with you. And so somebody who is saying, I have this, I have this, I have this, and doesn't have it, is going to end up getting shut out of any transaction with the swarm.

Now, peers will underreport. You know, it became widely known that antipiracy companies were sending notices for peers that were seeds; that is to say, peers that reported they had all of the pieces. And so there are options you can set to underreport your bit field but not to overreport.

Q. Based on your familiarity with the most common BitTorrent software, is it your opinion that whatever bit fields that users were reporting to Rightscorp they had, they at least had those?

A. Yes. And I've confirmed that in my trace analysis of BitTorrent traffic as well. You know, when I actually tested it and asked for pieces that peers said they had, I got those pieces.

MR. O'BEIRNE: That's all the questions I have, Judge.

EXAMINATION

BY MR. BROPHY:

Q. Ms. Frederiksen, you testified about this command, *"ON COMPLETION [NOT] PRESERVED."* Do you see that?

A. Yes.

Q. If Mr. Boswell had not put the "not" in there, the system would have logged whenever the 10 percent bit field rule was in operation; isn't that right?

A. If you coded "ON COMPLETION PRESERVE," it would have logged it.

Q. And he typed in "not" there instead, and as a result, it didn't log it, right?

A. That's correct, but if he had typed nothing there, the same thing would have happened.

Q. But he went through all the trouble of typing in *"ON COMPLETION PRESERVE,"* and if he would have just stopped there, it would have logged all the instances of 10 percent bit field, but then he typed "N-O-T" in addition, and it didn't log anything, right?

A. Yeah, he documented that he was taking the default, and that seems to have been his pattern when setting up these events is if he wanted it logged, he would say *"PRESERVE,"* and otherwise he would document that he was taking the default.

Q. And if the "not" wasn't there, it would have logged everything, right?

A. It would not have logged everything. It would have logged

that that event had occurred, so you would know that on a particular date/time, that event had run. It wouldn't log the details from what was going on, just that the event had executed.

Q. I may have been a little bit unclear about your testimony earlier, but was it your testimony that Rightscorp does this full download verification?

A. It's my testimony that Rightscorp does the full download verification that's contemplated where it talks about the torrent a couple sentences later. I think that the upper part of this paragraph pertains to downloads from the other three protocols where it would be necessary to download the file to verify what you got.

Q. Okay. So this full verification, this entire paragraph, your testimony isn't that Rightscorp performs all those steps, right?

A. No. My testimony is that it performs the steps that are relevant to BitTorrent, as described in this paragraph and the succeeding paragraph.

Q. But not all the steps required in that paragraph, right?

A. Not the steps that would be required for a peer-to-peer network where you had to download it to identify it.

Q. And particularly I've highlighted this passage in the middle. Rightscorp doesn't do that, right? It doesn't reach out and download a file from an individual target computer,

does it?
A. No, it does what's said below for torrent files --
Q. That wasn't my question.
A. -- it downloads from the torrent.
Q. That wasn't my question. I wanted to understand whether it did that. You've answered my question.
MR. O'BEIRNE: It's asked and answered.
THE COURT: If that's an objection, it's overruled.
BY MR. BROPHY:
Q. My last question, if your testimony today is directly inconsistent with Mr. Boswell's testimony, who is the jury supposed to believe?
MR. O'BEIRNE: Objection, Your Honor.
THE COURT: That's an improper question.
MR. BROPHY: I'm done. Thank you.
MR. O'BEIRNE: No further questions.
THE COURT: All right, ma'am, you may step down. Thank you very much.
THE WITNESS: Thank you, Your Honor.
MR. BART: Your Honor, plaintiffs rest.
THE COURT: Okay. Now, ladies and gentlemen, there are some legal issues that I need to resolve with the attorneys, and so I'm going to send you back to the jury room. Just relax, and as soon as we're done, I will have you come right back out again. Okay?

COURT SECURITY OFFICER: All rise for the jury.

(10:16 a.m., the jury exits the courtroom.)

* * *

THE COURT: Okay. You can be seated. All right. We'll start with the defense.

MR. THOMAS: Thank you, Your Honor. Would you like us to go issue by issue? I just want to know where I should pause.

THE COURT: Just make your motion.

MR. THOMAS: Very good, Your Honor. Grande moves under Rule 50 for judgment as a matter of law on direct infringement. First of all, there's been no evidence by which a jury could determine substantial similarities; specifically, the jury was not provided any copies for any sort of side-by-side comparison of any of the sound recordings at issue.

There is insufficient evidence that any of the alleged direct infringers were actual Grande subscribers, as opposed to, for example, folks that were using WiFi provided by an unsecured router, that sort of thing.

The IP address assigned to a specific account is, at best, circumstantial evidence that it was a subscriber doing the infringing. There's no evidence that any of the sound recordings at issue was actually distributed. Plaintiffs have failed to prove ownership. They have not provided a -- any

documents enough to prove a chain of title in the rights asserted, including the specific rights relating to distribution and/or the right to sue for past infringement.

Your Honor will recall that the Court granted a motion in limine on this issue and prevented Grande from addressing the ownership issue on the premise that there was an order at summary judgment determining ownership, and Grande maintains that that -- there is no such order on that issue.

On contributory infringement, the element of knowledge. Plaintiffs have not met their burden on knowledge owing to the fact that there's no way, it's undisputed that Grande cannot verify a notice, Grande cannot have actual knowledge. The notices at issue are insufficient to confer actual knowledge.

There's no evidence that Grande knew of plaintiff's copyrights. That information was not in the notice. The notices identified BMG rather than plaintiffs. There's no evidence that Grande knew of the copyrights, because there were no registration numbers. The notices were not PGP signed, so there was no way for Grande to determine they were legitimate. Notices did not comply with DMCA. They have been presented at various times through trial as if they were DMCA takedown-type notices. There was no evidence in the notices underlying the allegations, such as the bit field and the sorts of things that have been discussed, nor was there identification of the event

of the specific time of infringement.

There's no evidence sufficient to demonstrate that Grande had knowledge of alleged downloads. Even if they had knowledge, there was insufficient evidence that Grande had knowledge of all of the works in suit. That is to say knowledge has not been demonstrated on a work-by-work basis.

There could be no willful blindness because, again, there's no way for Grande to unblind itself, with respect to these allegations.

And then as to -- the jury was presented with evidence of -- that purported to show Grande's state of mind. All of that evidence was inadmissible under 17 U.S.C. 512(L).

For contributory infringement, there is insufficient evidence for the jury to find in plaintiff's favor on material contribution or inducement or basic measures. There has been no demonstration of a material contribution by Grande to the alleged infringement.

The measures that appear to have been contemplated; namely, terminating accounts, is not a basic measure to use the language that we understand will be in the jury instructions.

Termination. There's no evidence that termination would stop infringement. For example, in the case of free Internet at a coffee shop or that sort of thing.

There's no evidence that Grande actually provided evidence -- or, I'm sorry, provided access to infringing works

or, indeed, had access itself to the infringing works at issue.

Grande has no control -- and it's undisputed that Grande has no control -- on what's available on BitTorrent. It will stay there, according to plaintiff's own evidence, whether a particular customer has terminated or not.

On willfulness, plaintiffs have failed to meet their burden to demonstrate that any contributory infringement was willful. Again, there is no knowledge on Grande's part of actual specific instances of infringement. There's no evidence that Grande knew its alleged conduct was contributing to infringement. There's no knowledge, again, of the fact that these were plaintiff's copyrights at issue.

There's this matter of recklessness as the willfulness standard that we argued at the jury charging conference; namely, that the conflation of the recklessness standard for willfulness and for contributory infringement, which we'll incorporate here in this motion.

On the matter of damages, statutory damages, we move for -- as a matter of law that the compilation for the calculation of statutory damages should be that a work is a compilation as opposed to each individual sound recording being a single work.

Many -- wherever there was a registration that was registered as a compilation, that's a single work under the statute. Likewise, wherever there is a work made for hire,

that's a necessary compilation; therefore, a single work under the statute for purposes of calculating damages.

There is insufficient evidence to establish independent economic value of each of the sound recordings at issue. The only evidence that was provided was a conclusory statement by a representative from each of the record labels. This is insufficient to demonstrate independent economic value.

And finally, there's been no offering of eligibility on a work-by-work basis. I understand the Court has already ruled on a variation of this issue, but in any event, we maintain as a matter of law that plaintiffs have not carried their burden to demonstrate eligibility for statutory damages on a work-by-work basis.

Bear with me for ten seconds while I have a look at the notes.

(Pause.)

That concludes our motion, Your Honor.

THE COURT: Okay. Who's going to be -- Mr. Bart.

MR. BART: First off, with regard to defendant's motion, I think all that needs to be noted is that it is an attempt to re-argue every legal decision that's ever been made in the case, which is completely improper as a matter of law in terms of what a Rule 50 motion is supposed to be, everything going from ownership to rulings that Your Honor has already made. I think the best response to everything that they've

said is to make my own motion, which is to suggest that the record is --

THE COURT: Just a minute. He does say that I never made a ruling or Judge Yeakel never made a ruling on ownership of the documents, the --

MR. BART: But you have repeatedly throughout this case. You've made -- you've said that ownership has been resolved and is not an issue for trial in this case.

THE COURT: If I didn't do it before, I will now, because there's not been one shred of evidence anywhere that the plaintiff in this case did not -- plaintiffs in this case don't own those copyrights.

MR. BART: Right. Well, I mean, Your Honor, I could go through -- this was just a laundry list of literally everything they could possibly have mentioned, including the jury instructions and the rest. I don't believe that it warrants a response. I think that the best response -- I'm happy to address anything that Your Honor is seriously considering.

THE COURT: Just go ahead and do what you feel like you need to do.

MR. BART: Okay. Well, what I want to do first is move for judgment as a matter of law with regard to liability in this case. I think that the plaintiffs have demonstrated every element in a way that it could not be ruled otherwise.

With regard to direct infringement of each work, the downloads that have been obtained in this case are categorically copies that have been made from Grande users and are all, undeniably, distributions from that user to -- to Rightscorp. And they're all in the case and none have been contradicted in any way.

Moreover, each one of those downloads contains a TC number which tracks back to the prior notice, to the same user about the same work. So every single one of them, Grande was on notice of that user infringing this work. We have a copy of that work. It's been verified by Audible Magic and it proves really without any -- without any question that there's been direct infringement. And then that direct infringement has been corroborated in terms of knowledge both by the notice that goes back to that Grande has received and by their overwhelming willful blindness.

The willful blindness. Everything that Mr. Thomas was talking about in terms of not being able to verify and all of the other questions that he raised in his laundry list of points ignore the fact that for a period of six years, Grande did zero. It did nothing. It admittedly had no concerns, no information, no doubts about the information it was receiving. It just made a policy that no matter how many notices anybody got, they weren't going to do anything about it.

More classic case of willful blindness could not be

imagined, Your Honor. And between that willful blindness and the notice that was generated for each of the downloads, you have direct infringement and the knowledge element resolved.

With regard to the material contribution, that material contribution is continuing to provide Internet service to people who are repeat infringers and giving them the tools with which they continue to infringe. The records reflect that in 2016, Grande was aware that it had users who had received over 10,000 notices each, and that there were 500 of them that had 500 notices each, and they continued to provide Internet service to all of them.

And as a matter of fact, Mr. Horton testified that they would have continued to provide service no matter how many notices anybody received. So you have direct infringement. You have knowledge of willful blindness. You have material contribution, all as a matter of law, and we believe that judgment is warranted as a matter of law.

With regard to -- there's really two other points that I want to make the motion on. One is on the statute of limitations. We believe that there is no issue to go to the jury on that point, that the only evidence that is in the record is that all of the works that are at issue here were infringed after April 21st, 2014. All of the downloads here were downloaded in that same time period.

This evidence is in the record at Plaintiff's 459 for

the notices and Plaintiff's 5 for the downloads, and we don't believe that there's any issue of fact or evidence to the contrary that could go to the jury on point of the statute of limitations.

And finally, with regard to innocent infringer, we believe that there is no way that in a contributory infringement case where knowledge is required, that a party can be an innocent infringer. In this situation, there is either actual knowledge or willful blindness; either one of which would disqualify Grande as a matter of law from being an innocent infringer.

I'm prepared to address any of the issues that defendant raised. I think they're all kind of frivolous on their face, but I wanted to put on the record our motion, Your Honor.

THE COURT: All right. First of all, the defendant's motion for judgment as a matter of law is denied. There is sufficient evidence by which a jury could find by a preponderance of the evidence that the defendants were, in fact, aware of the infringing activity of their customers over hundreds, if not thousands, of occasions, and that they -- if they were not directly and absolutely aware in the sense that it could be proven, that they were willfully -- the jury could easily find that they were willfully blind. So both of those apply in this case.

With respect to the other aspects of the motion, these are basically issues that the Court has already ruled on either in writing or orally. I certainly understand why they're being re-raised, but the Court has already made rulings on those, and generally, with extensive argument by counsel. And none of those other issues, in my view, warrant the Court taking this case from the jury.

Now, moving on to the plaintiff's motion, that motion is denied. The Court does find that there are genuine issues which -- with one exception, could be and were contested by the defense sufficiently so that the jury properly is the one to find whether, in fact, the infringements here were, in fact, entitled to be considered to be intentional or reckless disregard. This goes to the innocence defense, and they did raise a lot of issues during the trial, whether the jury believes it or not, about the credibility and reputation of Rightscorp and whether they were within their bounds to have ignored Rightscorp's information.

Now, with respect to the statute of limitations, it does not appear to me that there is any dispute with respect to the statute of limitations. So I am going to grant the judgment to the plaintiffs on the statute of limitations issue because there really hasn't been any dispute with respect to that. The numbers are what they are.

MR. HOWENSTINE: Could I address that briefly, Your

Honor?

THE COURT: Yes.

MR. HOWENSTINE: The reason that we put that in the instructions -- and it is in the current set of jury instructions, Your Honor --

THE COURT: And it's going to get removed.

MR. HOWENSTINE: -- is just to frame the relevant time period, because there has been evidence introduced about Rightscorp notices that were sent in that earlier timeframe, before April of 2014.

THE COURT: Well, there's no question that we need to make sure we have the relevant time period, but there is a difference between that and my ruling as a matter of law that the plaintiffs have missed the statute of limitations, which they haven't.

MR. HOWENSTINE: Right. And Your Honor, the relevance of that instruction, the utility, is just to make sure that the jury understands that there's no recovery for infringements before April of 2014.

THE COURT: We'll take another look at that instruction. I think it's pretty clear.

MR. BART: Yes. Your Honor, this instruction is a defense, and they're saying there is no defense to the claim of infringement based upon the statute of limitations. And the information that is before 2014 is obviously relevant to issues

other than that in this case of willfulness, of willful blindness, of state of mind, of all of those things.

THE COURT: Well, let's make sure -- let's take another look at that instruction and make sure it does that. But you're absolutely right. There is absolutely no contrary evidence with respect to the issue of the statute of limitations.

MR. BART: No, Your Honor, and the --

THE COURT: The instruction says, *"Plaintiffs may only recover damages for sound recordings that you find was"* -- it should be were -- *"were infringed on or after April 21, 2014."* It's that simple.

MR. BART: Right, but the instruction is -- will not have an impact. If there's any instruction at all, it should be that plaintiffs may recover for all of the sound recordings asserted in this case, since they were all distributed or infringed on or after April 21st, 2014.

There's no point in telling the jury that we can only recover damages if you find it was infringed when there's no issue about when it was infringed. That's the whole point. The point of a statute of limitations instruction is to tell the jury that in their deliberations --

THE COURT: I thought we had testimony, though, that preceded 2014. Didn't we have testimony about that?

MR. BART: Of course we did.

THE COURT: Yeah. So I want to make sure the jury doesn't think that they can base their recovery on something that occurred in 2012 or 2011.

MR. BART: Well, they certainly can't recover for a work that was only infringed before 2014. But there are no works that were only infringed before 2014. But it can't be used to exclude evidence that's relevant on other issues that came before 2014. And that's what defendant is trying to do here. This instruction is telling the jury that they are to make a finding --

THE COURT: Well, there should be that -- the sentence, as it stands, is correct.

MR. BART: Well, but there's no finding --

THE COURT: Wait, Mr. Bart.

MR. BART: I'm sorry, Your Honor.

THE COURT: If you want to add a sentence that says, *However, the jury may consider actions by the parties which took place prior to 2014 for purposes of knowledge, intent, purpose*, that kind of thing, that would do it, Mr. Bart.

MR. BART: Well, I'm trying to think it through, Your Honor, and respectfully --

THE COURT: Think it through quickly.

MR. BART: -- the problem with the sentence that's here is that it's saying that you find it was infringed, which suggests to the jury that they have to look at the evidence and

see when it was infringed. And it is an undisputed fact that every work was infringed during the relevant time period.

It would be more appropriate to say that -- to have a separate instruction saying that evidence from before April 21, 2014 is not admissible to show infringements from before that date, but only with regard to state of mind and willfulness or other issues like that.

I mean, the point is there's a limitation that you're putting on the evidence before April 21st, 2014. It can't be used to set up a new work, right, because that new work would have been barred by the statute of limitations.

THE COURT: I understand that, but I just gave you an out, which says, *You may consider evidence of infringement alleged infringement prior to 2014 for purposes* -- which I have already elucidated.

MR. BART: I think that there's just an inherent ambiguity in having an instruction that requires the jury to find something that's not in dispute. So that's my objection to the sentence as it stands, is that it's saying that if you find --

THE COURT: Well, it may not be in dispute, but that doesn't mean that I can't advise the jury that they can't award damages.

MR. BART: Okay.

THE COURT: Let me give you an example.

Let's assume this was a car accident case. All right? And for purposes of showing the recklessness of the driver -- and let's say it's a rear-end hit, serious injuries, no question about liability. Okay? But the driver is saying, well, you know, this was an odd incident. I must have passed out or something else happened. But two weeks before, he was involved in a similar accident. Okay?

MR. BART: Right.

THE COURT: And that evidence came in for purposes of showing that -- you know, rebutting the testimony that he was just, you know, blacked out or whatever. This was not his normal mode of driving. Okay? I would -- even though I might and would in that case rule as a matter of law that the driver was liable, I would also give a limiting instruction that they couldn't give damages. They could consider the earlier accident, but they can't award any damages for the earlier accident. And basically that's what we have here.

MR. BART: I think that when Your Honor granted -- just granted the motion for JMOL on the statute --

THE COURT: Maybe I should withdraw it, and we'll get right back to where we -- you know --

MR. BART: I hear you, Your Honor, but the --

THE COURT: What do they say? What's the famous --

MR. BART: I should just shut up and sit down is what you're saying.

THE COURT: No, no, no. That's not what I was going to suggest, but they say there's no reward for good-doing.

MR. BART: That's right. No good deed goes unpunished.

THE COURT: There you go.

MR. BART: Right. But I guess the point is that once you grant the JMOL on the statute of limitations, I don't know what the purpose of the instruction is.

THE COURT: Well, because we had other testimony about all kinds of activities that went on before 2014, for which the jury is not entitled to award your client damages.

MR. BART: Okay.

THE COURT: So I am going to give some kind of -- guaranteed. Okay? You're not going to talk me out of that. I am going to give some sort of an instruction that they can't award damages prior to April -- for anything that occurred prior to April 21, 2014.

MR. BART: That's fine, but -- that's fine, but what needs to go in my opinion, after you say that, is that it's undisputed that each work in suit -- or it's been held that each work in suit was infringed or allegedly infringed during this period, and evidence from before that period is admissible for other purposes.

THE COURT: I just denied that JMOL.

MR. HOWENSTINE: Right, Your Honor, as you've

observed --

MR. BART: What JMOL?

THE COURT: I said I wasn't going to rule as a matter of law that there had been an infringement.

MR. BART: Oh, no, I said alleged infringement.

THE COURT: Well --

MR. HOWENSTINE: Your Honor, if I could make a suggestion. I mean, first of all, as you've observed, this statement in instruction Number 18 is indisputably correct. What we could do alternatively is we could add a sentence to the statutory damages instruction, instruction number 19, just stating, *"The relevant time period for statutory damages begins on April 21, 2014,"* period.

MR. BART: I would rather have, what you have with the evidence from before that period being admissible for other purposes. I mean, that's what you had suggested.

MR. HOWENSTINE: If the evidence has been admitted, the evidence was admissible. We don't need to be instructing the jury on what evidence they have already heard was admissible.

MR. BART: But we also don't need to be instructing them about a ruling --

THE COURT: No, no, look. You can't have your cake and eat it too on this one, counsel. I know you'd like to, but --

MR. BART: So what if we just add, *"The evidence before April 21st, 2014 can be considered for other purposes including state of mind, knowledge and willfulness."*

THE COURT: That's right. That's what I just said. I thought I just said that ten minutes ago.

MR. BART: Okay.

THE COURT: That's what we're going to do. That's appropriate. You get what you need. And what is it, like Liberty Mutual Insurance, you don't get what you don't need? Right? You are entitled to that, because I don't want them thinking that they can go back to 2011 or 2010 or whatever it was. We had some testimony about that early on, about those early things going on, and they heard it. They're taking notes like crazy over there, and I don't want them going back and saying, well, you know, they were -- this happened way back when, and we ought to figure that in too. No. No.

But it can be considered in terms of course of conduct and, you know, those kinds of things.

You want to draft something up, Mr. Bart?

MR. BART: Yes.

THE COURT: Let them see it. You know what my ruling is, so don't say no -- you can have your 10,001 objection. Okay?

MR. HOWENSTINE: Thank you, Your Honor.

THE COURT: But let him see it, all right? Because

we've got to finalize this before I instruct the jury. All right?

MR. BART: Okay. We'll get them a draft within five minutes.

THE COURT: We'll take a short recess.

MR. THOMAS: Your Honor, if I might --

THE COURT: Oh, no, here we go.

MR. THOMAS: While we're on the topic of jury instructions.

THE COURT: No, let's not.

MR. THOMAS: Can we add -- can we add an instruction that these are -- these songs are not eligible for statutory damages?

THE COURT: What songs?

MR. THOMAS: The ones that the Court determined over the weekend are not eligible. They're 31, I believe.

MR. BART: No. We have the number, because they're all works in suit. They're still works in suit and the judge has made a determination that we --

THE COURT: Well, I don't want them looking at the list and thinking, well, here we go. Because, you know, there's such a large -- we're talking about large numbers here, so I agree that we should in some manner let the jury know that there are 2000 and whatever the number was -- I don't remember.

MR. BART: Oh, you mean originally? There are 1422

works in suit.

THE COURT: 1422 works in suit; however, only --

MR. BART: 1391 were eligible.

THE COURT: -- 1391, and the following are not eligible. The following ones are not eligible. So that they don't get that confused. So draft up an instruction to that. You draft up an instruction to that effect. You're the one who wants it. Don't blame it on Mr. Bart.

MR. THOMAS: Thank you, Your Honor.

(Discussion off the record.)

* * *

MR. BART: Your Honor, I do want to address the list as you know. I'll wait until I see their instruction.

THE COURT: Okay.

COURT SECURITY OFFICER: All rise.

(10:49 a.m.)

* * *

(10:52 a.m.)

MR. ATTRIDGE: This is Kevin Attridge for the plaintiffs. We move to seal Plaintiff's Exhibit 18, Defendant's Exhibit 14, Defendant's Exhibit 15, Defendant's Exhibit 16, Defendant's Exhibit 17, Defendant's Exhibit 21, Defendant's Exhibit 24, defendant's Exhibit 25, Defendant's Exhibit 30, Defendant's Exhibit 46, Defendant's Exhibit 53, Defendant's Exhibit 54, Defendant's Exhibit 55, Defendant's

Exhibit 66, Defendant's Exhibit 67, Defendant's Exhibit 68, Defendant's Exhibit 69 -- oh, I'm sorry. Take that off. Defendant's Exhibit 90, Defendant's Exhibit 97, Defendant's Exhibit 104, Defendant's Exhibit 109, Defendant's Exhibit 155, Defendant's Exhibit 156 and Defendant's Exhibit 157.

MS. SZEWCZYK: Margaret Szweczyk for Grande Communications, and we move to seal the following: Plaintiff's Exhibit 45, Plaintiff's Exhibit 57, Plaintiff's Exhibit 58, Plaintiff's Exhibit 59, Plaintiff's Exhibit 60, Plaintiff's Exhibit 61, Plaintiff's Exhibit 62, Plaintiff's Exhibit 80. Plaintiff's Exhibit 81, Plaintiff's Exhibit 82, Plaintiff's Exhibit 84, Plaintiff's Exhibit 90, Plaintiff's Exhibit 91, Plaintiff's Exhibit 106, Plaintiff's Exhibit 108, Plaintiff's Exhibit 109, Plaintiff's Exhibit 166, Plaintiff's Exhibit 169, Plaintiff's Exhibit 180, Plaintiff's Exhibit 181, Plaintiff's Exhibit 184, Plaintiff's Exhibit 206, Plaintiff's Exhibit 216, Plaintiff's Exhibit 230, Plaintiff's Exhibit 233, Plaintiff's Exhibit 248, Plaintiff's Exhibit 262, Plaintiff's Exhibit 272, Plaintiff's Exhibit 274, Plaintiff's Exhibit 346, Plaintiff's Exhibit 712, Plaintiff's Exhibit 186.

And Defendant Exhibit Number 9, Defendant's Exhibit Number 27, Defendant's Exhibit 28, Defendant's Exhibit 77, Defendant's Exhibit 78, Defendant's Exhibit 111, Defendant's Exhibit 112, Defendant's Exhibit 113, Defendant's Exhibit 114, Defendant's Exhibit 137.

(10:55 a.m.)

* * *

COURT SECURITY OFFICER: All rise.

THE COURT: Please be seated. Okay, I've given you the Court's jury instruction on the disputed issue. You got that, right?

MR. BART: Yes.

MR. BROPHY: Yes, Your Honor.

MR. BART: Your Honor, I do want to address a couple of things, at least to put them on the record.

THE COURT: All right.

MR. BART: First with regard to the number of works that were taken out of the 1422, because the decision was made based on the papers filed yesterday -- and I appreciate the pressure and the need to make a decision that Your Honor did, but out of the works that were taken out, 12 of them were because they were duplicate registrations.

THE COURT: Right. There's no way the jury can tell which --

MR. BART: But as a matter of law, 12 -- those are supplemental registrations, which do not change the effective date of the original registration. So we didn't have a chance to respond to their papers. I need to at least put on the record that those 12 works did not change -- and they say supplemental registrations, and the example that they put in

their paper says supplemental registration. That does not create an issue for 412. That is simply a correction of some information or an addition of some information.

THE COURT: You know, for some reason, I'll be honest with you, I never lie to counsel. I missed that.

MR. BART: Well, I think that's important, and I think that, you know, if Your Honor would be willing to look at it, it's on the record, and I think that --

THE COURT: If it's just a supplemental registration.

MR. BART: Yes.

THE COURT: I didn't realize it was a supplemental registration.

MR. BART: Yes.

THE COURT: It should be in there.

MR. BART: Yes. So that is the major point, Your Honor. I want to preserve my objection --

THE COURT: No, you don't need to preserve your objection, because if that's a supplemental registration, and that's on the record --

MR. BART: I can give them to you, Your Honor. It shows the supplemental registrations on the side.

THE COURT: Okay. Then I will put those back in. Those should be in.

MR. BART: Thank you, Your Honor.

THE COURT: And I note your objection.

MR. THOMAS: I just want to make sure I understand. You're going to identify which -- you said there are 12?

THE COURT: Yes.

MR. BART: Why don't we -- we'll take a photo -- you want to take a photo of this, or we can take it --

MR. THOMAS: I just wanted to make sure I was clear.

THE COURT: If that was the only issue, then we'll make that change. So that 12, what is it now?

LAW CLERK: It's now 1403.

THE COURT: 1403. So here is what I propose to do, counsel. So we have now -- everybody agree we've settled the instructions? I know you've got objections, but we settled the instructions. No disagreement?

MR. BROPHY: Yes, Your Honor.

THE COURT: So now what we will do is I'm going to have -- any objection to Alison reading the instructions for me?

MR. BROPHY: None whatsoever.

MR. BART: No.

THE COURT: Because if I read the instructions, it's not going to be good. Well, maybe it will be good for you. I'll be croaking like a frog. So she will read the instructions. I will let them know that they are my instructions. I'm also going to provide them with -- I usually provide the jury with three copies so they know there's --

that's enough to take with them, so they don't have to take any -- trying to be furiously taking notes.

Once that is done, we will recess for lunch. When we come back, we're going to go right into closing argument, all right? So hopefully we'll get that all done today and they can either start -- well, my hope is they'll start their deliberations this afternoon.

Have you got that change, Alison?

LAW CLERK: Yes, I'm printing it now.

THE COURT: All right. Give her a minute to print it, and we'll bring the jury in.

(Discussion off the record.)

* * *

THE COURT: Bring the jury in.

COURT SECURITY OFFICER: All rise for the jury.

(12:02 p.m.)

* * *

THE COURT: Please be seated.

All right, ladies and gentlemen, we are now at that portion of the trial where you've heard all of the evidence. There's no more evidence to come in, and it is now the judge's responsibility at any federal trial to instruct the jury. Remember, I told you I'm the person who instructs you on the law, and I am the judge of the law, whereas you are the judges of the facts.

So what is going to happen now is that my law clerk, Alison Rogge, is going to read you my jury instructions with the consent of the parties. You know about my vocal issues, so it is just as if I was reading them to you. Okay? Please don't sit there and try to scribble down all this stuff that you're going to hear, because you will receive three copies of my jury instructions, as she's reading them, in the jury room. So you'll actually have copies. I send them in. A lot of judges don't. I do. Because I don't want you in there furiously trying to write them down.

And the fact of the matter is, when you do that -- I don't know how good of a note-taker you are. I'm not very good, and you could actually mess up some words or get it wrong. So it's much better for me to give you the jury instructions, and then there's no question about it. Okay?

All right, Alison, probably better if you go to the podium. Unfortunately, I don't think we can turn that podium sideways.

MS. ROGGE: I can just look at them.

THE COURT: You can start right now.

MS. ROGGE: Instruction Number One. Members of the Jury, it is my duty and responsibility to instruct you on the law you are to apply in this case. The law contained in these instructions is the only law you may follow. It is your duty to follow what I instruct you the law is regardless of any

opinion that you may have as to what the law ought to be.

If I have given you the impression during the trial that I favor either party, you must disregard that impression. If I have given you the impression during trial that I have an opinion about the facts of this case, you must disregard that impression.

You are the sole judges of the facts of this case. Other than my instructions to you on the law, you should disregard anything I may have said or done during the trial in arriving at your verdict. You should consider all of the instructions about the law as a whole and regard each instruction in light of the others without isolating a particular statement or paragraph.

The testimony of the witnesses and other exhibits introduced by the parties constitute the evidence. The statements of counsel are not evidence. They are only arguments. It is important for you to distinguish between the arguments of counsel and the evidence on which those arguments rest. What the lawyers say or do is not evidence. You may, however, consider their arguments in light of the evidence that has been admitted and determine whether the evidence admitted in this trial supports their arguments.

You must determine the facts from all the testimony that you have heard and the other evidence submitted. You are the judges of the facts, but in finding those facts, you must

apply the law as I instruct you.

You are required by law to decide the case in a fair, impartial, and unbiased manner, based entirely on the law and on the evidence presented to you in the courtroom.

You may not be influenced by passion, prejudice, or sympathy you might have for the plaintiff or the defendant in arriving at your verdict.

Instruction Two, Evidence. The evidence you are to consider consists of the testimony of the witnesses, the documents, and other exhibits admitted into evidence and any fair inferences and reasonable conclusions you can draw from the facts and circumstances that have been proven.

Generally speaking, there are two types of evidence. One is direct evidence, such as testimony of an eyewitness. The other is indirect or circumstantial evidence. Circumstantial evidence is evidence that proves a fact from which you can logically conclude another fact exists. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

Instruction Number Three, What Is Not Evidence. In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the

facts are. I will list them for you.

First, arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, will say in closing arguments and at other times, is intended to help you interpret the evidence but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

Second, questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the Court's ruling on it.

Third, testimony that is excluded or stricken or that you have been instructed to disregard is not evidence and must not be considered. In addition, some evidence has been received only for a limited purpose. When I have instructed you to consider certain evidence only for a limited purpose, you must do so, and you may not consider that evidence for any other purpose.

Fourth, anything you may have seen or heard when the Court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.

Instruction Number Four, Ruling On Objections. There are rules of evidence that control what can be received into

evidence. When a lawyer asked a question or offered an exhibit into evidence and a lawyer on the other side thought that it was not permitted by the rules of evidence, that lawyer might have objected. If I overrule the objection, the question was answered or the exhibit received. If I sustained the objection, the question was not answered and the exhibit was not received.

Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been. Sometimes I order that evidence be stricken from the record and that you disregard or ignore that evidence. That means when you are deciding the case, you must not consider this stricken evidence for any purpose.

Instruction Number Five, Witnesses. You alone are to determine the questions of credibility or truthfulness of the witnesses. In weighing the testimony of the witnesses, you may consider the witness's manner and demeanor on the witness stand, any feelings or interest in the case or any prejudice or bias about the case that he or she may have had and the consistency or inconsistency of his or her testimony considered in light of the circumstances.

Has the witness been contradicted by other credible evidence? Has he or she made statements at other times and places contrary to those made here on the witness stand? You must give the testimony of each witness the credibility you

think it deserves.

Even though a witness may be a party to the action and therefore interested in its outcome, the testimony may be accepted if it is not contradicted by direct evidence or by any inference that may be drawn from the evidence, if you believe the testimony.

You are not to decide this case by counting the number of witnesses who have testified on opposing sides. Witness testimony is weighed. Witnesses are not counted. The test is not the relative number of witnesses but the relative convincing force of the evidence.

The testimony of a single witness is sufficient to prove any fact, even if a greater number of witnesses testified to the contrary if, after considering all of the evidence, you believe that witness.

Instruction Number Six, Impeachment. In determining the weight to give the testimony of a witness, you may consider whether there was evidence that at some other time the witness said or did something or failed to say or do something that was different from the testimony given at the trial. A simple mistake by a witness does not necessarily mean that the witness did not tell the truth as he or she remembers it. People may forget some things or remember other things inaccurately.

If a witness made a misstatement, consider whether that misstatement was an intentional falsehood or simply an

innocent mistake. The significance of that may depend on whether it has to do with an important fact or only -- or with only an unimportant detail.

Instruction Number Seven, Expert Witnesses. When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely on it.

Instruction Eight, Deposition Testimony. Certain testimony has been presented to you through depositions. A deposition is the sworn recorded answers -- a deposition is their sworn recorded answer to a question a witness was asked in advance of the trial. Under appropriate circumstances, if a witness cannot be present to testify from the witness stand, that witness's testimony may be presented under oath in the form of a deposition.

Sometime before this trial, attorneys representing the parties in this case questioned these witnesses under oath. A court reporter was present and recorded the testimony. The questions and answers have been shown to you. The deposition testimony is entitled to the same consideration and weighed and otherwise considered by you in the same way as if the witness had been present and had testified from the witness stand in

court.

Instruction Number Ten, Limiting Instruction. When testimony or an exhibit was admitted for a limited purpose, you may consider that testimony or exhibit only for the specific limited purpose for which it was admitted.

Instruction Number 11, No Inference From Filing Suit. The fact that a person brought a lawsuit and is in court seeking damages creates no inference that the person is entitled to a judgment. Anyone may make a claim and file a lawsuit. The act of making a claim in a lawsuit by itself does not in any way tend to establish that claim and is not evidence.

Instruction Number 12, Burden of Proof, Preponderance of the Evidence. Plaintiffs have the burden of proving their case by a preponderance of the evidence. To establish by a preponderance of the evidence means to prove something is more likely so than not so. If you find that plaintiffs have failed to prove any element of their claim by a preponderance of the evidence, then they may not recover on that claim.

In determining whether any fact in issue has been proved by a preponderance of the evidence, unless otherwise instructed, you may consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Some of you may have heard the term "proof beyond a

reasonable doubt." That is a stricter standard. It only applies to a criminal case, and it requires more proof than a preponderance of the evidence. The reasonable doubt standard does not apply to a civil case like this one, so you should put the reasonable doubt standard out of your minds.

Instruction Number 13, the Digital Millennium Copyright Act. You have heard testimony and seen documents that refer to the Digital Millennium Copyright Act known as the DMCA. The DMCA provides that an Internet service provider, like Grande, may have a defense, called a safe harbor defense, to claims of secondary liability arising from infringement by users on its network. That defense is not available to Grande in this case.

However, the fact that the safe harbor provision does not apply does not bear adversely on the consideration of a defense by Grande that Grande's conduct is not infringing under The Copyright Act or any other defense. Attempting to qualify for the DMCA safe harbor is optional for Internet service providers. It is not a legal requirement.

Instruction Number 14, Copyright Definition. A copyright is a set of rights granted by federal law to the owner of an original work of authorship such as a musical composition or sound recording. In this case, the copyrighted works at issue all consist of sound recordings. The term "owner" includes the author of the work and assignee and an

exclusive licensee. Among other rights, the owner of a copyright has the exclusive right to distribute copies of the copyrighted work to the public by sale or other transfer of ownership or by rental, lease, or lending.

Instruction Number 15, Plaintiff's Claim. In this case, plaintiffs contend that Grande is contributorily liable for the unauthorized distribution of Plaintiff's 1,422 copyrighted sound recordings by subscribers of Grande's Internet service.

Instruction Number 16, Infringement. In order to prove contributory copyright infringement, plaintiffs must first establish, by a preponderance of the evidence, the following four elements.

First, that they owned copyrights in their sound recordings and that the copyrights and their registrations in each of the sound recordings is valid. This issue has already been resolved, and you do not need to decide it. Plaintiffs have already established that they are the owners of the 1,422 copyrighted sound recordings at issue in this case and that the copyrights and their registrations in each of these 1,422 sound recordings is valid. However, you do need to determine the other three elements.

Second element, whether users of Grande's Internet service used that service to infringe plaintiff's right to distribute their works. A copyright owner's exclusive right to

distribute its copyrighted work is infringed by distributing any part of the copyrighted work without plaintiff's authorization. Plaintiffs are not required to prove the specific identities of the infringing users, and plaintiffs may prove infringement through direct or circumstantial evidence.

As evidence of direct infringement, plaintiffs are entitled to rely on, and you are permitted to consider, evidence that copyrighted content was offered or distributed to a third-party who is investigating or monitoring infringing activity.

If you find that users of Grande's Internet service distributed any of plaintiff's copyrighted works at issue or any portion thereof without plaintiff's authorization, then plaintiffs have established that users of Grande's Internet service have infringed plaintiff's copyrights in those works.

Third element, whether Grande knew of specific instances of infringement or was willfully blind to such instances of infringement. The term "willful blindness" means that someone believes there is a high probability of a fact, but deliberately takes steps to avoid learning it.

Fourth element, whether Grande induced, caused or materially contributed to the infringing activity. This standard is met when a defendant can take basic measures to prevent further damages to copyrighted works, yet intentionally continues to provide access to infringing sound recordings.

Instruction Number 17, Damages. Consider damages only if necessary. If the plaintiffs had proved some or all of their claims against Grande by a preponderance of the evidence, you must determine the damages to which plaintiffs are entitled. You should not interpret the fact that I am giving instructions about the plaintiff's damages as an indication in any way that I believe that plaintiffs should or should not win this case.

It is your task, first, to decide whether Grande is liable. I am instructing you on damages only so that you will have guidance in the event you decide that Grande is liable and that the plaintiffs are entitled to recover money from Grande.

Instruction Number 18, Damages: Statute of Limitations. Plaintiffs may only recover damages for a sound recording that you find was infringed on or after April 21st, 2014. You may consider evidence of events or recordings that occurred prior to April 21st, 2014, but only for the purpose of assessing the defendant's state of mind, knowledge, and/or willfulness.

Instruction Number 19(a), Statutory Damages, Generally. Plaintiffs may elect to receive statutory damages under the United States Copyright Act. Statutory damages are damages that are established by Congress in The Copyright Act to compensate the copyright owner, penalize the infringer, and deter future copyright infringements.

You must issue an award of between $200 and $30,000 for each eligible copyrighted work that you found to be infringed. You must not award statutory damages for any of the 19 copyrighted sound recordings listed at the end of this instruction. However, the other 1,403 copyrighted sound recordings are eligible for statutory damages.

If plaintiffs prove that Grande acted willfully and contributorily infringing plaintiff's copyrights, you may, but are not required to, increase the statutory damage award to a sum as high as $150,000 per eligible copyrighted work.

An instruction to finding willfulness will be given next.

If you find that the infringement was innocent, then you may, but are not required to, award as little as $200 for each work innocently infringed.

An infringement is considered innocent if Grande proved by a preponderance of the evidence that Grande was not aware and had no reason to believe that its acts constituted an infringement of copyright.

You should award as statutory damages an amount that you find to be fair under the circumstances. In determining the appropriate amount to award, you may consider the following factors: The profits Grande earned because of the infringement; the expenses Grande saved because of the infringement; the revenues that plaintiffs lost because of the

infringement; the difficulty of proving plaintiff's actual damages; the circumstances of the infringement; whether Grande acted willfully, intentionally, or recklessly in contributorily infringing plaintiff's copyrights; the need to deter Grande from infringing again in the future; the need to deter others from infringing in the future, and in the case of willfulness, the need to punish Grande.

In considering what amount would have a deterrent effect, you may consider Grande's total profits and the effect the award may have on other Internet service providers in a marketplace.

Plaintiffs are not required to prove any actual damage suffered by plaintiffs to be awarded statutory damages. Should you choose to do so, you should award statutory damages whether or not there is evidence of the actual damage suffered by plaintiffs, and your statutory damage award need not be based on the actual damages suffered by plaintiffs.

There is then a list of 19 works -- would you prefer I read the 19 list of works?

THE COURT: Yes.

MS. ROGGE: Okay. Bruno Mars, *Gorilla;* Bruno Mars, *If I Know;* Bruno Mars, *Natalie;* Bruno Mars, *Show Me;* Bruno Mars, *When I Was Your Man;* Bruno Mars, *Young Girls.* Trey Songz, *About You;* Foo Fighters, *The Pretender;* Wiz Khalifa, *KK(Featuring Project Pat Juicy J);* Wiz Khalifa, *Still Down;* Wiz

Khalifa, *The Sleaze;* Wiz Khalifa, *True Colors;* Jennifer Lopez, *Same Girl;* Katy Perry, *By The Grace of God;* Katy Perry, *Chose Your Battles;* Katy Perry, *Dark Horse;* John Legend, *The Beginning;* John Legend, *Who Do We Think We Are;* One Direction, *Ready To Run.*

Instruction 19(b), Statutory Damages: Willfulness. Grande's contributory infringement is considered willful if plaintiffs proved by a preponderance of the evidence that Grande had knowledge that its subscribers' actions constituted infringement of plaintiff's copyrights or that Grande acted with reckless disregard for or willful blindness to the plaintiff's rights.

Instruction Number 20, Limiting Instruction Regarding BMG v. Cox. You have heard evidence in another case, in another court, with different parties, that there was a verdict reached in a copyright litigation against a different Internet provider. This evidence may be considered by you only for the purpose of evaluating the state of mind of Grande executives and employees and the state of mind of plaintiff's executives and employees at the time and nothing else.

It is not to be considered by you as evidence that because a different Internet service provider was found liable, that Grande in this case is liable. Although the other case involved Rightscorp, it involved different parties, different lawyers, different facts, additional evidence, and different

instructions on the law.

In other words, it was a totally different case with the exception of the involvement of Rightscorp. Further, this case went up on appeal and the final result of that case is not before you and is not relevant.

Instruction Number 21, Duty To Deliberate. It is now your duty to deliberate and to consult with one another in an effort to reach a verdict. Each of you must decide the case for yourself but only after an impartial consideration of the evidence with your fellow jurors.

During your deliberations, do you not hesitate to re-examine your own opinions and change your mind if you are convinced that you were wrong, but do not give up on your honest beliefs because the other jurors think differently or just to finish the case.

Remember, at all times, you are the judges of the facts.

You have been allowed to take notes during this trial. Any notes that you took during the trial are only aids to memory. If your memory differs from your notes, you should rely on your memory and not on the notes.

The notes are not evidence. If you did not take notes, rely on your independent recollection of the evidence and do not be unduly influenced by the notes of other jurors. Notes are not entitled to greater weight than the recollection

or impression of each juror about the testimony.

When you go into the jury room to deliberate, you may take with you a copy of this charge, the exhibits that I have admitted into evidence, and your notes.

You must select a foreperson to guide you in your deliberations and to speak for you here in the courtroom.

Your verdict must be unanimous. After you have reached a unanimous verdict, your jury foreperson must fill out the answers to the written questions on the verdict form and sign and date it.

After you have concluded your service and I have discharged the jury, you are not required to talk with anyone about the case.

If you need to communicate with me during your deliberations, the jury foreperson should write the inquiry and give it to the court security officer. After consulting with the attorneys, I will respond either in writing or by meeting with you in the courtroom. Keep in mind, however, that you must never disclose to anyone, not even to me, your numerical division on any question.

You may now proceed to the jury room to begin your deliberation.

THE COURT: Actually, you won't. You're going to hear closing arguments, and that will be at 2:00, okay, because it's 12:30 now. So at 2:00, you will come back from lunch and --

have we gotten them lunch today?

COURTROOM DEPUTY CLERK: Starting today, they're officially sequestered.

THE COURT: So it starts today. Okay. Apparently you get pizza today, on the Court. The parties aren't paying. No concern about that. The Court -- your taxpayer dollars are paying for your pizza. Okay? And that will occur throughout your deliberations. All right?

I have to enter an order for that. Some judges don't do it. I don't know why, but if you're here, you should get your lunch paid for. But it won't be pizza every day. I promise.

Thank you very much. Come back at 2:00. We'll see you, and then we will go right into closing argument. I'll explain a little bit more about that as soon as you come back, and then we're going to get the case to you to start your deliberations. Thank you.

COURT SECURITY OFFICER: All rise for the jury.

(12:27 p.m., the jury exits the courtroom.)

* * *

THE COURT: Okay. Be excused. Have lunch. Get yourselves ready, and we'll see you back here at 2:00.

Counsel, before we leave, I need the two principal -- I need to do something on the record real quick.

(Sidebar discussion, 12:28 p.m.)

Here in the Fifth Circuit, I don't know whether you're used to this, but this is the statutory time for objections to the jury instructions and comments and other things to be placed on the record. I would propose that all comments, rulings by the Court and objections and/or arguments in favor of instructions be deemed to have been placed on the record at this time. And there's no objection?

MR. BART: No objection.

MR. BROPHY: No objection.

THE COURT: Thank you.

(Sidebar concluded 12:29 p.m.)

* * *

(2:07 p.m.)

COURT SECURITY OFFICER: All rise.

THE COURT: Please be seated. Are you all ready, counsel?

MR. BART: Yes.

MR. BROPHY: Yes, Your Honor.

THE COURT: Okay. Let's bring them in.

COURT SECURITY OFFICER: All rise for the jury.

(2:07 p.m., the jury enters the courtroom.)

* * *

THE COURT: All right. Please be seated. All right. Now, ladies and gentlemen, what we're going to do now -- and we start with Mr. Bart for the plaintiff -- is what we call

closing argument or, if you were a lawyer on the East Coast, summation. Okay? This is the time when the lawyers have the opportunity -- and it's really the only time during a trial -- to talk to you about what they believe the weight of the evidence is. Okay?

Now, there's a big difference between opening statement, which is, as I explained to you, their opportunity to give you a road map of what they believe the evidence would show. This point in the trial, they have the opportunity to not only tell you what they believe the evidence now has shown, because you've seen all the evidence -- the testimony of witnesses and all of the documents, but also, to use an advertiser's term and I don't mean this in the derogatory way, to put their spin on it. Because you have to remember, lawyers are advocates.

They have the right to tell you what they believe you should pay attention to, what they believe is evidence that has critical weight to it, and also what they believe -- which evidence they believe has little or no importance. And that's their job, because a lawyer's responsibility, whether it be a plaintiff's lawyer or a defense lawyer, is to be a zealous advocate for their client. That is their ethical duty. So if they do less than that, then they haven't served the interest of their client and, quite honestly, they haven't served their role as an officer in this court.

So there's nothing wrong with what they're doing. They're doing what they're supposed to do. They will recall for you what the evidence is from their perspective. You must always remember that you are the finders of fact. So if your recollection of the evidence differs from theirs, of course your recollection controls. Okay?

Now, this is a very important part of the case for the parties, so please -- you've been great. I've watched -- you know, part of my job is to watch the jury and you have been extremely attentive over this past month and I know the lawyers truly appreciate it and I know you'll give them your careful attention during this very important part of the trial for them. Okay?

Remember, what the lawyers tell you is not evidence, but they have every right to recall for you what they believe the evidence has shown in this case. Okay?

Mr. Bart.

MR. BART: Thank you, Your Honor. Good afternoon, ladies and gentlemen of the jury. Speaking on behalf of myself and our entire trial team, we're very grateful for the personal sacrifices that you've made to help us get to this end of the journey. Your patience and open-mindedness are essential for this process to work.

It's now the part of the case where the lawyers try to connect the dots, highlight critical evidence and testimony and

ask you to render judgment in their favor. And to do that properly, we have to start off by recognizing that this trial has gone on since October 12th and that it's basic human nature to remember the most recent events most clearly, but some, if not most, of the important testimony happened weeks ago. So I want to start by going back to some of the crucial testimony about Grande's policies and behavior that you heard at the beginning of the case.

As I said during my opening, Grande's goal is to try and scapegoat Rightscorp and make you think that Rightscorp is the defendant here. No matter how hard they try, Grande is the defendant and it is their conduct that is at issue: How Grande intentionally opened the floodgates to massive infringement of content on Grande's system by its subscribers; how Grande turned a blind eye to well over 1.3 million notices of specific infringement, but did nothing because Grande had a company policy not to take any action to address repeat infringement. One might call it a willful blindness policy; how Grande benefited from that decision financially despite their ultimate awareness that they have an obligation under federal law to terminate repeat infringers.

Indeed, the story of Grande's conduct is so powerful and uncontradicted that it compels a verdict for the plaintiffs. So first, let's revisit how Grande got here.

The critical decision in this case to abolish a robust

repeat infringer policy was made in 2010 by people -- none of whom showed up in court -- the upper management and legal departments of Grande's management companies.

As I told you in my opening, Grande once had a robust policy for dealing with the devastating BitTorrent piracy that was occurring on its network and took action on that policy. But after it was purchased in 2009 by a Boston-based private equity firm, it abolished that policy, and for the next seven years allowed users to infringe without consequence on the Grande network even if they were identified in thousands of infringement notices. As I said, the policy of willful blindness.

I told you that Grande would not produce a single witness to explained that decision, and they haven't. And I told you that if you follow the money, you'd see that the same Boston private equity firm sold the company at the end of that seven-year period and netted $400 million, and that the absentee decision-makers who abolished the repeat infringer policy netted millions personally, and most of them are still running Grande today.

So how did we do on that one? The undisputed facts do, indeed, confirm that Grande once had a robust policy for addressing BitTorrent piracy. Mr. Bloch told you that before private equity money took over Grande, he insisted on creating a policy for dealing with infringement and that it was

important that that policy contain punitive measures to address piracy. He agreed that after receiving multiple notices, Grande should terminate customers.

Mr. Horton told you that under its prior policy, Grande did terminate subscribers for copyright infringement. Other witnesses focused on suspensions, but there's no question that Grande devoted resources to this issue, felt that they had a responsibility to address it, and turned off service when it was appropriate.

And there's also no dispute that the policy was abolished by Grande's new management company in 2010. Mr. Horton told you that the decision to abolish the policy came from Atlantic Broadband company, or ABB, on the East Coast. It was replaced with a policy where no user would ever be terminated for trampling on the rights of copyright owners. Indeed, Mr. Horton confirmed that Grande never terminated a single user for seven years, and then under the new ABB policy, no one would be terminated even if they racked up a thousand notices.

Remember, no one involved in making this decision testified at the trial. That decision was made in 2010, and it's the reason that we are here. And Grande hasn't said a word about it, because they have nothing to say. So instead of putting up any defense, they put up sacrificial lambs, the Texas-based employees of Grande, to take the heat for decisions

made 2000 miles away by people who pocketed millions but don't have the courage to show their face on the witness stand. And then Grande has the nerve to say that its employees are good people and weren't intending to cause piracy. As if that's in dispute or even marginally relevant.

And we don't disagree. Mr. Horton, Mr. Bloch, Mr. Fogle and Mr. Rohre all seem to be good people, but none of them made the decisions that are at issue here. But the fact that Grande is spineless enough to present these witnesses to take the heat for the decisions made by Grande's true management underscores that they have no good faith excuse for what they've done. They wanted to maximize profits and reap the benefits even though they knew that a substantial portion of the profits were caused by turning a blind eye to the massive piracy on its network that caused such profound damage to copyright owners.

Remember the video testimony of Matt Murphy, who came in with that new management in 2009, ran the company when it steamrolled over the rights of content owners and pocketed a cool $3 million in addition to his salary and bonus when the company was flipped? He couldn't even look straight into the camera and admit that Grande should have done something about it if they knew that a specific infringer was -- user was infringing. And the bounty didn't end with Mr. Murphy.

John Feehan, the CFO of Patriot, Astound and Grande

told you that other members of management like the CEO, John Holanda, their general counsel, Jeff Kramp, and Mr. Feehan himself also profited to the tune of millions of dollars. And we know that the legal decision made -- the Legal Department made all the decisions here. But they either stayed in the gallery at the back of the courtroom or stayed home and let others dance around their decisions.

So don't fall for their "we have good people" excuse. It's wholly irrelevant to the issues in the case and, frankly, Grande should be ashamed to throw their people under the bus like that.

Now, contrary to all the excuses and fictions that Grande is telling you now, between 2010 and 2017, Grande knew that the notices reflected actual copyright infringements but just decided to turn a blind eye to them. Grande's policy of willfully ignoring powerful evidence of repeat infringement was demonstrated throughout the trial.

Remember the testimony of Richard Fogle? That he was put on a project that required him to evaluate the handling of infringement notices. He was startled by what he saw. He wrote, *"There are no limits here."* He said he -- he raised warning flags that the policy didn't comply with the law, and he said that there were some customers up to their 54th notice. Then he wrote that, *"Unlike some other ISPs, there's no three-strike law and -- or anything that we follow."*

Mr. Fogle's e-mail concluded that Grande had no process or remedy in place. Based on that evidence, Mr. Fogle rightly questioned whether we were seeing a broken process. And as you now know, it was a broken process.

In response, Roberto Chang said he asked Legal if we need to do more and agreed that if Grande didn't do more, it might lose its safe harbor status. And that is exactly what ultimately happened. Like many whistleblowers, Fogle was simply taken off the project.

Nor is there any evidence that Grande ever doubted the accuracy of any of the infringement notices during that time period. Mr. Horton confirmed that Grande never investigated the truth or falsity of any copyright notice, not just Rightscorp, any of them. And had no information suggesting that any notice was false or that any monitoring company didn't have the tools to detect infringement.

Remember that Mr. Bloch testified that he told Matt Murphy, Grande's president, that Grande subscribers knew that they had downloaded the content reflected in the notice every time. And what did Grande say in the form letter when they forwarded a second infringement notice to the same user? They said that the notice identified an unauthorized download or distribution of copyrighted material. There was no allegation of -- they never said it was an allegation. They referred to the incidents as "infractions," and they told the user to

destroy the infringing material and to contact them within two days to confirm compliance with that request.

This contemporaneous language is what Grande actually believed before they paid lawyers and experts to come up with retroactive excuses for their disregard of the rights of copyright owners. And it corroborates what Mr. Fogle thought in 2013, that Grande had a broken system and that Grande was not in compliance with the law.

And their conduct with regard to Rightscorp was even worse, if that's possible. Let's start with one important fact. Grande never even sent a single Rightscorp notice to one of its customers until March of 2016. How do we know that? Well, first, Mr. Horton admitted as much, and Grande's own records show it.

DX 111 is a Grande spreadsheet reflecting every infringement notice Grande sent on to its customers. One of the columns identifies the company that sent the notice, and Rightscorp doesn't appear until March 1st, 2016; thus for five full years, they did absolutely nothing with Rightscorp notices. They're now telling you a fictional story when they forwarded notices that they tried to inform and educate their customers. Well, they didn't do it with Rightscorp notices, and not because they had any objections to Rightscorp. They were ignoring Rightscorp. Mr. Horton admitted that they never investigated Rightscorp or had any facts showing that any of

the notices were wrong.

But Rightscorp did come into their focus in 2014 when another music company, BMG, sued another ISP, Cox, based on Rightscorp notices. Mr. Horton and Robert Creel, Grande's director of network and technical support, noted the filing and stated that if BMG won, it would cause changes in the way the industry operated. Mr. Horton testified that he was aware back then that the BMG lawsuit was based on Rightscorp notices.

During that same period, Grande received letters from Rightscorp directly advising them of specific repeat infringements and offering to provide Grande with access to a dashboard to review the evidence. It was only a click away, but Grande looked the other way. Rightscorp also sent them weekly roll-up reports of infringement on the Grande network, but unsurprisingly, that was also ignored.

And finally, Rightscorp sent them a formal letter offering to meet so that Rightscorp could explain its system and answer any questions that Grande might have so the parties could work collaboratively to address the massive piracy on Grande's network. But, of course, Grande turned a blind eye and never even bothered to respond.

Grande's conduct after it learned of the Cox verdict further confirms that Grande knew that Rightscorp notices were legitimate. The day after BMG won a trial verdict against Cox based on the Rightscorp notice in December 2015, Mr. Creel sent

an e-mail to Mr. Horton saying that, We may need to revisit this process at some point, regarding copyright infringement.

Then on Thursday, February 18, 2016, Grande's Legal Department, which was run by Jeff Kramp, the GC of Patriot and RCM and Grande, asked to speak to Matt Rohre. Ostensibly, Mr. Kramp wanted to talk about a letter he had received a year earlier from Rightscorp offering to meet and talk about ways the companies could work collaboratively. But in the wake of the BMG verdict, based on Rightscorp notices, there's no question why Mr. Kramp was really asking this.

Mr. Rohre, in turn, looped in Mr. Horton and asked him for his take. Mr. Horton's immediate response, Send Mr. Rohre a link about the Cox verdict and Rightscorp's role in that case.

So they all knew that there was a ticking time bomb in the file cabinet. Between that Thursday and the following Monday, there was frantic activity at Grande, after five years investigating how many infringement notices they had and how many came from Rightscorp. In the preceding five years, they had no idea, but now they needed to know.

And then they learned that Grande had received 700,000 notices in 2013, '14 and '15, over 400,000 of which came from Rightscorp. What was Mr. Horton's reaction? *"Wow."*

Perhaps even more of a wow was the fact that two customers had received over 10,000 Rightscorp notices, 40 had

received over a thousand, and 500 customers had received over 500 notices. Wow, indeed. But the news for Grande got even worse because they also learned that Grande had never forwarded a single Rightscorp notices to any of its customers over any of these years because of what they called a "technical glitch." And they hadn't noticed it for all these years. Why? Because they couldn't care less about copyright infringement and didn't even note that their automated system wasn't working properly, for the company that was sending them more than half of their notices for five years.

But then something curious and telling happened. When the glitch was fixed on that very same Monday -- it was a busy weekend at Grande -- and Grande could move forward and now forward Rightscorp notices to its customers, Mr. Horton directed the tech person to suppress implementing the fix so that it could be discussed internally. But after Grande provided all this information to the Legal Department of its corporate overlords, it was instructed to start sending letters to customers based on Rightscorp notices, and that's what they did. Between March and December of 2016, Grande forwarded more than 6,000 Rightscorp notices to its customers using the same form letters that we were just talking about.

That decision destroys any argument that Grande believed that there was an issue with the reliability of the Rightscorp evidence. And that conclusion is hardly surprising,

given that Grande concededly never investigated the Rightscorp system, never had any factual basis to conclude that any notices were false. In fact, the trial record shows the only thing they knew about Rightscorp was that its notices were at issue at the Cox trial.

And at the same time as these events were going on, the Boston-based private equity firm was selling Grande to a new private equity firm and pocketing $400 million in the process. But the people involved in managing Grande, the Patriot bigwigs like Mr. Holanda, Mr. Kramp, Mr. Murphy and Mr. Feehan, all remained connected to Grande through the management company, and each pocketed millions from the transaction. So their willful blindness had paid off handsomely.

But once the millions were safely in their pockets, they realized that they still had to deal with the ticking time bomb of its disregard for rampant piracy on its network. And that after the Cox verdict, it couldn't continue without a DMCA policy and certainly couldn't maintain its existing policy of willful blindness of never terminating a single repeat infringer, even those who had received over 10,000 notices.

So they announced a new DMCA policy in 2017, months before this suit was filed. And that new policy exposes every excuse and argument that you've heard from Grande in this trial as a lie, that was manufactured after the lawsuit was filed.

How do we know that? Because under the new policy, the new policy recognized Grande's obligation under federal law to reasonably implement a repeat infringer termination policy and act in response to notices of infringement. And it also expressly said that the notices they received reflected copyright infringement.

Mr. Rohre testified that once Grande began terminating customers for copyright infringement, it was the right thing to do under its policy. Even though almost all of those terminations -- and there were only 12 -- were based on Rightscorp notices. But they didn't do it before -- and he also admitted that they could have done the same thing in the previous seven years, but they didn't do it because they had a different management philosophy, a philosophy of willful blindness.

But then Grande is sued and manufactures a fictional litigation strategy. Call the notices allegations, claim helplessness, take the side of infringers and blame the record companies.

In my opening statement, I suggested by the time the evidence came in, you might be wondering why Grande was so aggressive here, why it refused to play any constructive role in protecting copyrights, even though it was the only party capable of addressing the piracy on the network, why it refused to even meet with Rightscorp when Rightscorp proposed working

together instead of being adversaries, why it insists on taking the side of the infringer instead of the side of the artist, particularly in a music capital like Austin.

Well, again, it's the old story of follow the money. They knew that it only cost them three or four cents in direct cost to generate a dollar of revenue from their Internet customers, so they wanted -- and still want -- as many customers as possible, even if those customers are rampant pirates, as long as those customers are paying for Grande's services. And if they were damaging the music industry and trampling on property rights by turning a blind eye to infringement on their network, that was an easy call for them; particularly the management companies that were the puppet masters here.

So they hired lawyers and experts to manufacture retroactive excuses for Grande's willful blindness. But as Mr. Horton admitted, Grande never asserted any of the arguments or defenses it has presented at trial until after it was sued.

So those undisputed facts bring us to the courtroom and to this trial. And now you're being asked to determine if they're sufficient to hold Grande liable for contributory infringement. And the answer to that question is emphatically yes. Given the unchallenged record, this is an open-and-shut case of contributory infringement.

In essence, there are three requirements for

contributory infringement and you heard them in the instructions this morning. Direct infringement by Grande's users, Grande's material contribution to the infringement and Grande's knowledge of or willful blindness to specific acts of infringement. While I'll address all three, the only one that really requires much discussion is the direct infringement by Grande's users.

While Grande has tried to make this issue sound complicated by suggesting all sorts of hypothetical situations where there might have been errors in Rightscorp notices, you don't have to parse the source code. You don't have to see a detailed analysis to see proof positive that Grande infringed all 1422 works in suit. That proof resides in the downloads that Rightscorp obtained for each work. Simply put, every single work at issue here was directly downloaded from one or typically more Grande subscribers and is in evidence before you, every one. Indeed, there are 19,000 infringing files are the works in suit and evidence before you that were obtained directly from Grande's customers. Each of whom was, in turn, distributing these files to countless other users every time he or she was connected to BitTorrent.

In Grande's opening statement, you were told that there's no evidence that Grande ever downloaded a song -- that Rightscorp ever downloaded a single song from a Grande user. But Grande's own expert admitted that there were 19,000 songs

downloaded from Grande subscriber. Our label witnesses and Mr. Landis of the RIAA listened to 175 of them and confirmed they match the label sound recordings. You've listened to some of them, and you can listen to as many as you want, but there's no need to do so, because every one of them is confirmed to be an infringing copy of one of plaintiff's works by Audible Magic, an industry standard music-matching service that compared the downloads to the official feeds that the labels provide to its digital partners.

Both Mr. Landis and our expert, Barbara Frederiksen, testified about the reliability of Audible Magic. You recall that Ms. Frederiksen testified that Audible Magic software is used more than 3 billion times a year, and there's about one error per year. And tellingly, there was absolutely no testimony or evidence to the contrary from Grande. Even Grande's own technical expert, Dr. Cohen, testified that if Audible Magic is right, there are tens of thousands of downloads from Grande's users' computers.

Grande has said nothing about these downloads because they know that each one of them obtained from a Grande subscriber using BitTorrent is a recording owned by plaintiffs and their artists. In other words, they're proof positive of direct infringement.

The downloads are actually more than proof positive that a Grande subscriber infringed every work at issue. They

also validate the Rightscorp notices, because every one of those downloads contains a TC number or tracking number. Remember, those TC numbers are internal Rightscorp tracking numbers for the notices. And the same TC numbers appear on the downloads; so, therefore, you can trace each download track back to a prior notice that Rightscorp put Grande on notice that this very user had infringed that same track.

So now you have a three-step irrefutable proof of infringement of every work in suit, first for each of the works in suit as an infringing download that Rightscorp obtained directly from a Grande user. Second, there's an Audible Magic confirmation that the download is plaintiff's recording. And finally, these two steps confirm the accuracy of Rightscorp prior notice to Grande identifying the user as having infringed this recording.

Grande has no evidence to even suggest that the firm evidentiary chain from notice to download to Audible Magic to this courthouse was wrong for a single one of these 1422 works. So don't fall for hypothetical after-the-fact excuses. Grande has had the data and downloads for years, and if there were errors, you would have heard about them during this trial.

So when you hear theoretical issues manufactured after the lawsuit was filed, ask yourself, where is any evidence that any of these speculative situations ever occurred?

Ladies and gentlemen, one of the cardinal rules of

this process is don't leave your common sense at the door. Every one in this room knows that every single download is an infringement of one of the works in suit, and this evidence resolves any dispute about direct infringement by Grande's users.

While it's not necessary given the downloads, the notices sent by Rightscorp are a separate, powerful circumstantial basis for finding direct infringement since every single user who is interacting with Rightscorp is also interacting with endless other users out in the Internet. That's the way BitTorrent works.

Every technical expert has agreed that the Rightscorp system can accurately engage with BitTorrent users on Grande's network who are offering torrent hashes, confirm the hash of the torrent that the user is offering to share, compare the content of that with the copyrighted works that Rightscorp is monitoring, and convert that information to a notice sent to Grande.

Moreover, Ms. Frederiksen, who is an expert on how file sharing using BitTorrent works, tested the Rightscorp system directly by sharing works on BitTorrent and confirmed that Rightscorp accurately detected her activity. Grande could have chosen to run a test of Rightscorp's system, but it chose not to, because it knows at the end of the day that the process works.

And at the end of the day, the downloads and three-step confirmation I described earlier provides simple, irrefutable confirmation of direct infringement.

The second component of contributory infringement is whether the defendant materially contributed to the infringement. In this case, the answer is so clear that Grande hasn't even addressed the issue. Grande provided its high-speed Internet network for Grande's repeat infringers to use, the very mechanism and tools that allowed its customers to continue to infringe and, even worse, continue to provide these tools when it documented that the user had hundreds and even thousands of infringements. But rather than deal with that, throughout the case, Grande has asked questions about whether anyone at Grande intended to encourage infringement.

The plaintiffs don't need to prove inducement or encouragement of infringement. All they need to prove is that Grande materially contributed to the infringement, regardless of Grande's motive. Although we know what Grande's motive was, and that is beyond dispute.

The third component of contributory infringement is whether Grande had knowledge of specific infringements or was willfully blind to them. Again, the answer is yes. While willful blindness is the ultimate answer since that is the policy that defined the company, as an initial matter, the 317,000 notices that Grande received from Rightscorp about the

works in suit are powerful circumstantial evidence of knowledge of specific infringements for the same reason that I told you before.

Every one of the users identified in those notices was out on the Internet, out on BitTorrent, making the same songs available and to be copied by thousands of other users that Rightscorp detected. Grande doesn't dispute receipt of these notices or contend that any of them are false. All they say is they don't know. But that's simply not an adequate response, since Grande admits, as it must, that it never asserted any flaws in notices nor did anything to verify, test, or ask questions about any of them.

Grande's employee, Stephanie Christenson, admitted that she couldn't point to a single instance in which Grande concluded that the activity reflected in the Rightscorp notice did not occur.

But more importantly, as I said to you before, Grande willfully blinded itself, not simply to the infringements on the Rightscorp notices, but to the infringement in all of the notices it received over a seven-year period from numerous other monitoring companies for music, for movies, for all sorts of content. It basically had a policy of willful blindness, documented by Mr. Fogle, where they just sent out notices, took no action, had no human interaction, didn't monitor the notices, didn't notice when notices hadn't been sent for five

years. They put their head in the sand, ignored the mountain of evidence, and took no action whatsoever.

Now, I've used the term "willful blindness" many times, and it is a critical term, because it is another way and the primary way to demonstrate Grande's knowledge of the infringement. As you heard this morning, willful blindness basically means that someone, here Grande, believes that there's a high probability of a fact that specific infringements are occurring on its network, but deliberately or recklessly take steps to avoid learning it.

Grande's entire approach to copyright infringement from 2010 to 2017 was a policy of willful blindness. Grande's decision specifically to ignore 1.3 million infringement notices from Rightscorp, to fail to even forward a single Rightscorp notice, which could have put its users in a position to challenge them if they wanted to, and to fail to respond to Rightscorp's invitation to discuss the system, its dashboard, its weekly roll-up reports, are a textbook case of willful blindness.

Again, that's just a small part of the willful blindness, because they're receiving notices for all kinds of content from all kinds of monitoring companies and their company policy was the same in each. Indeed, it's hard to even imagine a party being more willfully blind to infringements on its network than Grande.

And now that we've covered Grande's conduct and legal standards for holding it liable for that conduct, it's time to turn to the calculation of damages to be awarded for Grande's massive infringements and violations of the copyright act.

There are two preliminary topics that I'd like to discuss with you about damages. First, plaintiffs have elected to receive what's called "statutory damages." There are two primary reasons why the law gives a plaintiff the right to seek statutory damages.

First, it's extremely difficult, if not impossible, to accurately assess actual damages in a case of viral infringement like this. At its core, the problem arises from the fact that when a Grande customer uses BitTorrent to distribute copies of copyrighted content, he or she is doing far more than enabling one illegal download. He or she is becoming a distribution node for the unlimited future distribution of countless infringing copies of that work.

In essence, an unlicensed download store on the web. In other words, it's like an unlicensed iTunes music store without having to make a payment. And for each work in suit, we don't just have one infringement. There are multiple infringements, each creating multiple new unauthorized distribution nodes.

To compound the problem, in the closed, anonymous world of BitTorrent, all anyone can see are the infringements found by Rightscorp, where they were searching for specific works. We

can't see any interactions between any of the millions of other BitTorrent users who were sharing pieces of files with each other. Thus what Rightscorp uncovers is a tiny fragment of the infringements that are going on from these same users of these same works. The tip of the iceberg, if you will. Because when BitTorrent offers one of plaintiff's recordings, a BitTorrent user, they can distribute the recording to hundreds or thousands or more of other users who in turn each become further unauthorized download stores.

This type of viral infringement is the very reason that the testimony of Mr. Kemmerer is of no value whatsoever. He does a simple but irrelevant mathematical calculation, as any CPA would, who has no expertise as to how BitTorrent actually works of the specific number of infringements detected by Rightscorp times the cost of the download. But the damage to the plaintiffs in this case is not the loss of a single download, it's the fact that BitTorrent users are then uploading these files to countless others whenever they connect to BitTorrent.

Mr. Kemmerer based his calculation on what Rightscorp did to discover the infringement and not on what the BitTorrent users actually do with the files; namely, to distribute them to other people, endless numbers of other people. No record company ever has or would authorize that. And if they did, the price would be astronomical, because it would be competing with their authorized distribution channels. So since nobody knows

the extent of the distributions directly caused by Grande's BitTorrent users, limiting plaintiff's recovery to the type of simple calculation Mr. Kemmerer proffered dramatically understates the damage to plaintiffs. To remedy that problem, the law provides statutory damages.

The second reason that the law provides an option of statutory damages is because the law wants you to consider other factors in addition to actual damages. Indeed, as you heard this morning, plaintiffs are not required to prove any actual damages to receive an award of statutory damages. However, the statutory damages includes factors that relate to actual damages. So let's deal with them first.

One of them is, that it's so difficult to quantify actual damages. We've already talked about that. Given the inability to quantify how much business each unauthorized distribution node has done and how far the viral distribution of plaintiff's works has spread to create additional download stores, it's impossible to know the degree to which plaintiffs have been harmed, but what we do know is that the impact of digital piracy on the plaintiffs has been massive.

Each of the label witnesses has testified to the impact, citing research and personal experience. You've seen the 50 percent drop in revenue, the closing of labels, the firing of thousands of employees. Grande itself admitted that it couldn't survive that type of savaging of its revenue base.

And it goes beyond the labels to the entire music ecosystem. Record stores close, pressing plants close, distribution centers close, jobs disappear, artist royalties collapse, and the revenues necessary for labels to invest in talent dries up. We all suffer as a result.

Plaintiff's economic expert, Dr. Lehr, summarized the research in the field and testified that virtually all the research holds that the impact has been enormous.

Now, of course, Grande is not liable for all the harm caused by this kind of piracy. But Grande did play a material role in creating thousands and thousands of new unauthorized download stores. And in this trial, Grande has not put forth any evidence addressing the economics of piracy or its impact on the music industry or attempting to rebut Dr. Lehr's testimony in any way or any of the research on which it was based, or the personal firsthand experience of the label reps who have lived through this debacle in real time.

All they have done is to have attorneys hypothesize other reasons for the implosion of the label's revenue base, but those questions and speculation are not evidence, as well as being wholly baseless.

Tracing Grande's profits from the infringement is also difficult, but we do know that Grande has been extremely profitable and that its revenues and profitability spike noticeably once it opened the floodgates of unregulated piracy.

Not only did their financial results improve, but they were able to increase the market value of the company during the exact time they had a willful blindness policy by a remarkable 140 percent or $400 million.

The next statutory factor relates to the circumstances of the infringement. This deals with two separate points. One again is the massive viral and anonymous nature of BitTorrent, but the other is the critical role that an ISP plays in the BitTorrent ecosystem.

As I told you during the opening, only an ISP can connect the IP address obtained from a monitoring company to a specific Grande subscriber and to take action against that subscriber. Only the ISP can do that. No one else has that information. Without active participation from an ISP, addressing piracy on BitTorrent is simply impossible. But Grande has brazenly stated that it has no duty to do anything in response to infringement notices. But given its role in the BitTorrent ecosystem, that position is illegal and, frankly, immoral and Grande knows it.

Grande had a policy that recognized its responsibility to address BitTorrent piracy before 2010. And Grande's 2017 policy recognizes Grande's obligation under federal law to implement a reasonable repeat infringer policy. The problem for Grande is that for the years 2010 to 2017, the years at issue in this lawsuit, it admittedly had no policy. It had a

policy of willful blindness.

Tellingly, John Feehan, the CFO for Grande's management companies, admitted that if Grande knew that its users were using and stealing copyrighted content and kept giving them Internet service to do it, that would not be consistent with Grande's values. That's why they had the policy before 2010. That's why they have the policy after 2017. The policy and actions in the interim were illegal and immoral, and they know it.

And that takes us to the next statutory factor, whether Grande acted willfully, intentionally, or recklessly in contributorily infringing plaintiff's copyrights. On this record, there's only one correct answer. Yes.

Grande abolished its policy for addressing repeat infringers willfully and intentionally. Grande refused to terminate any user, even after 10,000 notices, and that decision was willful and intentional. Grande ignored 1.3 million notices. Didn't even notice that they weren't being forwarded. Willfully and intentionally and recklessly.

Grande did not even -- the willfulness is obvious here. And once you find willfulness, the law expressly gives you the right to punish Grande for its willful behavior.

The next critical factor is the need to deter Grande from infringing again. There can be no doubt that Grande's just chomping at the bit to eliminate any termination policy. I

don't have to say it. They say it themselves. In Grande's opening statement, they told you that you can decide whether termination programs like the one Grande implemented are necessary.

Well, Grande and the ISPs are the only party that can police piracy on BitTorrent at all. And they are telling you, you can free them from that obligation. While Grande's Texas employees like Mr. Bloch and Mr. Fogle understand the role that ISPs play in addressing BitTorrent infringement, Grande's management and legal team firmly believe that the law doesn't apply to them, despite the fact that the ISP is the only party that can play that role. And despite the fact that the ISP is providing the high-speed Internet necessary for the infringements to occur in the first place.

This is a company that has made the intentional decision to side with the infringers, to use its greed for additional profits as a justification of trampling on the property rights of the entire content ecosystem, from music to movies and beyond. They need to be deterred and it needs to be a strong message. And it will take a stiff award to deter Grande. Its owners made millions turning a blind eye to infringement and Grande has generated over a billion and a half dollars during the relevant time period.

Not only have their revenues been substantial, but their gross profit margins are growing and are now around 200 million

a year, and it's important to note that deterring Grande doesn't mean deterring its Texas employees. It means deterring the decision makers from the management company and the Legal Department, the suits who set the policies.

That takes us to the final critical factor, the need to deter others from infringing in the future. This case is not just about Grande. The entire ISP community is watching. They're getting direct reports from this courtroom. And a slap on the wrist will be interpreted by the ISP industry as a license to disregard evidence of piracy and to disregard the rights of copyright owners just like Grande did.

My old friend Michael Elkin is sitting right there representing Cox and watching this case right now. There are reports going out in realtime, but even more importantly, the corporate overlords that run Grande and make all their policy decisions now run the sixth largest ISP in the United States and are hoping for a verdict that allows them to turn off all enforcement for all of these related companies.

They want to be able to simply turn a blind eye, to apply their willful blindness standard to all of these companies. This statutory factor lets you send a message to their general counsel in the back of the room, Jeff Kramp, and the others who oversaw the lawlessness of Grande between 2010 and 2017, that not only Grande, but all of Astound, has to comply with its obligations under the law and respect all property rights and

not merely its own.

So where does that leave us? With a defendant that has clearly violated The Copyright Act, that knew of or was willfully blind to specific infringements by its customers on its network and that materially contributed to that infringement; that did so willfully and intentionally and is brazenly unapologetic about its conduct; that openly defends infringers even when the infringers don't defend themselves.

This is not a mom-and-pop local company or a start-up. This is a company run by magnates, big-money interest that pocket the profits from the company and make all the legal and policy decisions. They need to receive the strongest possible message that their conduct is legally and morally wrong and simply unacceptable.

So what are we asking for in damages? As you heard this morning, The Copyright Act permits a statutory award between 750 and $30,000 per infringed work. But if the infringements are willful, as they clearly were here, that $30,000 per work cap lifts and you can award up to $150,000 per infringed work.

You will decide the appropriate amount, but we submit that given Grande's outrageous conduct, the award must be in the willful category, that is north -- and we believe well north -- of $30,000 per work. The willful and unapologetic, indeed arrogant and aggressive posture that Grande's management have taken, including blaming the victim and scapegoating anyone

else it can while it rides roughshod over the property rights of content owners justifies a substantial award, and we trust you to find the right place and the willful range to place that.

Given the simplicity of the case ultimately and the lack of any credible evidence to the contrary on any of the three requirements to prove contributory infringement, it's not surprising that most of Grande's case focuses on issues that have nothing to do with the determination of contributory infringement or the damages that should be awarded for that infringement. I'd like to call them smokescreens, things to distract you from what's really at issue. So let's take them on briefly and show why they have nothing to do with the issues you have to decide.

First off, they present themselves as protectors of their users' privacy. They say we don't snoop on users. We don't monitor them. You've even heard counsel asking questions about ISPs kicking down users' doors and suggesting that the labels are asking them to be some sort of secret police. But this argument is not only insulting, it's an empty rabbit hole because nobody is asking them to do any of that.

As Grande itself recognizes in its DMCA policy, all they need to do is log infringement notices, pass them on to consumers, and take responsible actions if the infringements continue. Mr. Horton put Grande's entire argument to rest when

he admitted that no one from the labels ever asked Grande to monitor its users, intercept information, or review the customers' activities. But then they ask: How can we vet the reliability of the monitoring company or the notices? Again, nobody is asking them to do that.

All they need to do is to log the infringement notices, pass them on to consumers, and take actions if the infringements continue. Then they say, how can we decide who's right if the consumer disputes the allegations in a notice? To begin with, they haven't identified a single instance where that ever happened; particularly with Rightscorp, because they never forwarded any Rightscorp notices for five years.

But even if they did, no one is asking them to make that decision. All they need to do is log infringement notices, pass them on to consumers, and take responsible action if the infringements continue. If they choose to exclude notices that are challenged by consumers, fine, but they didn't do that. Instead, they completely ignored all notices for seven years. Moreover, this verification excuse is not only irrelevant, it's demonstrably wrong.

The record is clear that Rightscorp directly reached out to them to meet so they could explain their process and reliability. Let's look at the letter that Rightscorp sent to Grande in 2015 that we talked about earlier. It expressly said -- and this is important language -- *"We understand,*

however, that you have a supremely valid interest in responding only to accurate allegations of infringement. That is one of the reasons why we want to have a face-to-face meeting."

Rightscorp wanted to explain its system to Grande so Grande could trust it. It's clear why Grande wants to say they don't have a way to verify it, but it clearly did. They were simply willfully blind to the information that they had on their fingertips, because they didn't want to know. But while no one forced them to verify, they did need to do something.

You can't ignore all notices for seven years, in most cases fail to pass them on to consumers, not take any actions when the infringements continue, and simply make up excuses after you get sued. That is willful, malicious conduct that must be called out for what it is and must be punished, because it simply isn't right.

Grande tries to refocus your attention from its indefensible conduct to Rightscorp's business practices. Yes, Rightscorp offered infringers the option to pay a small settlement fee to resolve the notice of infringement. That's neither illegal nor relevant to whether their system accurately identified and documented infringements. It's merely an attempt to sway you to decide the case on issues that are unrelated to the case.

There's nothing in the record to suggest that Rightscorp business practices played any role in Grande's conduct. And,

indeed, the conduct and policy that were said back in 2010 happened before Grande was even a company or -- Rightscorp was even a company or sending notices to Grande.

Grande also harps on the fact that Rightscorp doesn't maintain all the data that Grande wishes it had maintained, but none of that matters in the presence of the downloads, proving the actual infringements by the actual Grande subscriber.

You've also heard Ms. Frederiksen testify about her review of the Rightscorp source code and testing of the Rightscorp system and how it can do what it says it will do: Identify infringers through reliable hash-matching, engage in handshakes, and document the connections. This was not disputed by Grande's expert testimony.

Further, Rightscorp's decision not to maintain some redundant data cited by Grande has a practical basis that applies to both Grande and Rightscorp. Rightscorp has sent out over a billion notices over its existence. Maintaining the extra data that Grande pretends it would like to see is enormously expensive, and given the downloads, all that data is redundant. Grande complained to you during this case about the cost of maintaining its own data. Well, the same is true for Rightscorp for the same reason.

Beyond all that, remember that Grande decided to forward Rightscorp notices in March 2016 in the wake of the Cox verdict. That decision confirms the challenges to Rightscorp

data are just after-the-fact excuses to deflect your attention from what really matters, Grande's conduct.

Since Grande has no rebuttal to the powerful fact that there were 19,000 actual downloads of the works in suit from Grande subscribers, it makes two irrelevant arguments about the download process.

First, Grande points out that in some of the other downloads that Rightscorp did beyond the 19,000, that they don't contain a song at issue. Well, that's true, it actually underscores the accuracy of the Rightscorp system. As you heard during this trial, in every case where Rightscorp downloaded something other than the song at issue, that other material was contained in the same torrent payload that contained the song at issue. And we know that for certain because the torrent hash, or the file that Rightscorp downloaded, is the same as the torrent hash that includes that song.

So when Rightscorp downloaded any file from that torrent payload, it was documenting that that BitTorrent user had a torrent that included the song at issue. None of those downloads have been presented here as evidence of infringement, but they certainly don't reflect errors. They reflect additional proof that the user has the torrent at issue and was distributing infringing content without permission.

Grande also complains about the uncontroversial fact that

Rightscorp wasn't always able to get a download from a particular user. But of course, Rightscorp could only get a download when the user was online with BitTorrent open, which was obviously not all the time. Grande's argument here is no more persuasive than saying that if you knock on someone's door and they're not there, that means they don't live there.

Grande's prize argument is based on the fact that for a limited period of time, Rightscorp lowered its bit field requirement from 100 percent to 10 percent. But that has no impact on the basic chain of liability that I mapped out for you before. Every single work in suit was actually downloaded, generally many times, by Rightscorp from a Grande user, and that download has been forensically confirmed by Audible Magic.

The transmission of that download to Rightscorp by a Grande user was undeniably an act of infringement. Every one of those downloads can be traced back to a prior specific notice relating to that same user, and in each of those cases, the bit field setting was wholly irrelevant since the user undeniably had the entire work. And the proof is here in the courthouse in the actual work that was downloaded in its entirety. So for all the recordings at issue, the 10 percent bit field is simply not an issue.

But their biggest sideshow is to blame Greg Boswell's story. How many times have we heard Grande's mantra that to believe plaintiff's case, you need to trust Mr. Boswell. Well,

we firmly believe that Mr. Boswell's testimony about how the system operated was honest and credible and was corroborated by Ms. Frederiksen. Indeed, even Grande's expert, Dr. Cohen, conceded that the code worked.

But all you really need to know to believe plaintiff's case is that the Rightscorp system downloaded every work in suit from a Grande user. And for every single download, there's a previous notice identifying that same user as infringing that same work. Grande doubled down on this attack at the end of their case with the testimony of Dr. Cohen who admitted that he didn't have any experience in either the music industry or file sharing using BitTorrent, so it's no surprise that Mr. -- Dr. Cohen's objections are theoretical ivory tower judgments that ignore important parts of the code and the downloads and connected notices.

Furthermore, it's important to understand the nature of his testimony. He's a guy who audits the computer systems of major corporations and government on a best-practices basis. Rightscorp isn't a major corporation. It's a start-up. And the issue is not whether its internal procedures should be more organized, but rather whether it's capable of doing what its source code says it can do. And for all his criticisms, Dr. Cohen couldn't deny that the Rightscorp system is capable of doing what it says it can do.

While Grande has hypothesized situations where Rightscorp

might have been wrong, they have not identified any actual errors, and more importantly, can't contest that the Rightscorp system is capable of accurately identifying and documenting infringements by Grande's users.

In our opening statement, we promised to tell you about how the recording industry operates; how it was profoundly damaged by Grande's actions, how it's one of the great American industries, an industry that takes risks, invests in artists and their careers and tries to adapt to changes in technology and consumer demand to give us the music that enriches our lives; how it plunged into economic free-fall in 1997 with the introduction of the MP3 file that caused the industry revenues to drop by 50 percent in the next 15 years, and ultimately destroyed the business model that the industry had relied on since its inception.

How Grande's decision to abolish its repeat infringer policy came right in the heart of that collapse before there was the faintest inkling that streaming might create a new business model based on access rather than ownership, and how Grande's decision interfered with transitions to that new model.

We delivered extensive testimony about all of that, particularly the devastating effects of piracy on the industry, and it has all gone undisputed. There is literally not one document or line of testimony that contradicts anything that we

have said. You all know the power of music. You all know the importance of the recorded music industry, both in Austin and around the world. You know about the jobs lost and the economic and personal disruption caused by piracy. Many of you may once have shared pirate files yourself, but my guess is that most of you now use licensed streaming services and recognize that music isn't free and that piracy is not a victimless crime.

This suit is not, as it was insultingly suggested, a lottery ticket. This an effort to address a core basic threat to the industry, a threat that nearly destroyed the industry during the very time that Grande was trampling on labels' property rights and is still a threat today, and to send a message to the only people who are capable of restricting and controlling that piracy, that they have to play their part and can't turn the other way.

I do need to comment, though, on some of the remarkable things I've heard from Grande's counsel during this trial. We've heard them today, without any evidence, that the collapse of the CD market was caused by consumer demand for individual songs instead of albums. But that's really just a flawed attempt to blame the victim. The record companies have adapted for decades to these kinds of changes. What's different in this case is not a change in format, but the fact that rampant piracy was driving that format.

Overnight in 1997 and 1999, every single song in the world was available for free on the Internet. That's not a situation that the labels were controlling, directing, and they had to respond to a world that had changed before they had a chance to even get involved. And here Grande was not an innocent bystander. It enabled the pirates and provided them with the tools.

The industry tried to respond in any way that it could. It tried to create a digital download market, but its efforts were undermined by piracy. Why would people buy downloads when all the downloads were available for free?

As Mr. McMullan from Universal told you, piracy deprived the labels of the ability to develop a legitimate digital market because it was all available for free overnight. Once that happened, the labels' model imploded --

COURT CLERK: Counsel, three minutes.

MR. BART: Thank you.

-- and whether they tried to sell albums or singles didn't matter.

We've also heard them say without evidence that streaming -- subscription streaming is a better deal for consumers than buying CDs, as if they're saying, see, piracy is a good thing. But that's a malicious response to the disruption caused by piracy. When Grande abolished its repeat infringer policy, there was no streaming market and there was

no Spotify. This is just more of Grande's basis of beliefs that it's okay to profit at the expense of others, to mock and blame the victim when the property is being stolen, and to side with those who steal it instead of respecting the owner's property rights.

But let's contrast that with how Grande acts when its own property is at stake. When users don't pay for service, Grande terminates them. When bars show content that Grande has an exclusive license for, Grande sends trucks to the bars to shut it down. Grande's witnesses have consistently testified that they believe that their intellectual property rights are valuable and are aggressive in protecting them.

The bottom line is that Grande believes in property rights but only when it applies to them. If it's someone else's property and it's a benefit to them, they're happy to look the other way.

Ultimately, this is a case of right and wrong, and Grande's upper management and corporate overlords were clearly unequivocally wrong. They abolished their repeat infringer policy so they could reap the maximum revenue from the explosion of piracy on BitTorrent. They pocketed the revenue of willful infringers. They turned a blind eye to the overwhelming evidence of specific infringement. They flipped the company for $400 million, pocketing millions individually for all the people who made the decision to look the other way.

But ultimately, the Cox case happened, and they knew there was a time bomb in their files, so they belatedly adopted a DMCA policy that proves beyond any doubt that they had been willfully blind between 2010 and 2017.

So as I ask Mr. Horton, *"If the jury finds that infringement alleged in a notice actually occurred, then that means you were providing Internet service to users who are guilty of infringement, of which you had notice."* He honestly said, *"Yes."*

Think about that answer. It's a clear admission of liability. Not only is liability clear, but the offenses were willful and demand a strong, clear response.

We trust all of you to do what is right and to send a message that trampling on property rights is wrong and won't be tolerated. Thank you for your patience and your focus and your moral compass.

THE COURT: We'll take about a five-minute recess, let counsel set up, and let you have an opportunity to use the restroom, and we'll come back. All right.

COURT SECURITY OFFICER: All rise for the jury.

(3:13 p.m., the jury exits the courtroom.)

* * *

(3:29 p.m.)

COURT SECURITY OFFICER: All rise.

THE COURT: Please be seated.

* * *

COURT SECURITY OFFICER: All rise for the jury.

(3:30 p.m., the jury enters the courtroom.)

THE COURT: Ladies and gentlemen, it is now defense counsel's opportunity to make his closing argument on behalf of his client. He only has one opportunity to address you, so please pay careful attention just like you did for Mr. Bart.

MR. BROPHY: Thank you, Your Honor.

Hello, again. It's been a while since I've been able to speak with you directly. It's nice to see you. I wanted to start today with the phrase I started my opening with. *"Knowing about an accusation is not the same thing as knowing that an accusation is true."* That is a very important phrase for this case, and it's going to be a very important phrase for you to think about when you're conducting your deliberations and, most importantly, when you're reading the actual jury instructions.

That's not something you've seen yet. You've heard the instructions. You haven't seen it. I'm going to show you those during my presentation. This case is about whether the plaintiffs can prove their case pursuant to those jury instructions, so you're going to be paying careful attention to that.

You may recall way back when, at the beginning of the month I gave you this hypothetical. It's frankly, a little bit

of a rude one, the notion that I would accuse one of your neighbors of engaging in a red light violation. I posed this hypothetical where I would come in and send one of you an e-mail and say, I'm going to send you an e-mail, I'm going to accuse one of your fellow jurors of running a red light, right outside at Eighth and Congress. I think I chose 8:25 a.m. And I said, okay, what if I sent you that e-mail or I sent you ten of those e-mails or a hundred of those e-mails. And the question is, does that mean that you know that the juror sitting to your left or right actually ran the red light or not? And of course the answer is no. Right?

That means that you know I accused them of running the red light. You don't have actual knowledge that that person ran the red light. And I explained in order for you to know, you either have to be at the intersection looking at that car zooming through the intersection or you have to be presented with evidence that you can review, that you can bet, understand, and decide for yourself whether it's legitimate or not. And perhaps after reviewing that evidence, you can come to the conclusion that it actually happened. You can have actual knowledge. But the e-mail alone doesn't give you actual knowledge.

And I think what we've proven to you -- I hope we have -- during this case, is that Rightscorp doesn't have any actual evidence to present. They sent a boatload of e-mails.

There's no denying it. Grande got tons and tons and tons of e-mail accusations just like the e-mail I postulated suggesting someone ran a red light. But those are just accusations. And the question is: Where is all the evidence? There isn't any. And when you go back there to deliberate, you're not going to see any. We're going to talk about that today.

But first I'd like to talk about what the record labels think is required to prove a case of copyright infringement. You may recall a couple of times throughout this trial we've put some documents in front of you from the actual record labels and from their industry association, the RIAA. And those documents set forth a set of requirements for what needs to be collected and saved, forensically, as evidence to support an accusation of music sharing.

Now, unlike the Rightscorp accusation and unlike the evidence in this case where there is no evidence, the RIAA and the record labels require a specific evidence package. We talked about this before. It requires a log of all the investigations, recordation of all those packets of data that transmit back and forth. Control communications back and forth between the two computers that they negotiate them, BitTorrent protocol connection. The all-important bit field data. You guys are probably never going to want to hear the word "bit field" again, but the bit field data is super important. It's what indicates -- and I said this the very first day we met --

it's what indicates whether the computer has a song or not.

The traceroute data that shows the packets and the route they take between the detection computer and the computer out on the Internet, alleged to be engaging in the music sharing. And then we'll talk about this too, independent review records.

So when you go back -- I think you're going to be getting it electronically -- you'll have access to all the exhibits that have been admitted in this case. And one of the exhibits that I'd ask you to take a look at is this one, Defense Exhibit 68. Defense Exhibit 68 is that RIAA requirements document.

Now, I went through this extensively with Dr. Cohen last week, and on cross-examination the plaintiff's attorneys suggested this was a one-off, that this is -- we plucked some document out of the bevy of options available and all the contractors that work with the RIAA, and we just chose this one. We cherry-picked it. First, you haven't seen any others. If there was another document that said something else or had different requirements, you would have seen it. None of those exist. There are only these requirements.

But take a look at Defense Exhibit 67 at the same time. Defense Exhibit 67 is an earlier version from 2011 of the same requirements and includes all the same requirements, that same list of things I mentioned before, the log of all the

control communications and the steps of the investigation and the bit field data. This is not a one-off. The RIAA and the record labels have required these company's packages to be collected and saved for years and years and years.

So when you go back and deliberate, I'd ask you to take a look at this document 68 and go to page 11. That's where you're going to find the phrase "evidence packages." That's where it first shows up. And if you flip two pages over, on page 13, you're going to see an explanation of what those evidence packages are used for. They are considered legal documentation. They are the things that prove the e-mail accusations are legitimate. No evidence package, no evidence.

Now, this document also sets forth two different types of verification that can be performed for detections of music sharing. Number one is a full download verification. And you heard some testimony about that today. Confusingly, the suggestion was that Rightscorp does that full download verification, but I think you recognized from my cross-examination, it requires an actual song to be downloaded from every target computer. It says it right in the middle of the text where I highlighted earlier this morning. Rightscorp doesn't do that. So Rightscorp doesn't do a full download verification, that's just not true.

The second one, the hash-based verification. That's closer to what Rightscorp claims it does. Rightscorp claims

that it downloads a song from the swarm and it gets this hash, that magical hash the plaintiffs love to talk about. And once it gets that hash, it looks for other songs on the Internet, but it never downloads those songs, and it never downloads even a part of these songs. And the problem is that's a specific requirement from the RIAA.

Now, Ms. Frederiksen testified today that Rightscorp does this, that they download those songs. Well, that's weird, because Mr. Boswell says they don't. So I asked her earlier today, who are we supposed to believe, you or Mr. Boswell? But the fact of the matter is there's no download.

Dr. Cohen said the same thing. There's no download. There's no part of a download. And the consequence of this is that the Rightscorp system sends out e-mails having never initiated a download of a file. And that means they don't know whether that computer is actually offering the file or not. They don't care. They want to send out e-mails with the pay link so they can get paid. They don't meet the RIAA's requirements for downloading a file. And the reason you have to download a file -- and it's right here in black and white -- is threefold.

"The respondent will download enough of the file to be able to record the source and destination and to prove, number one, that the user was offering the file; number two, that the user is a valid peer-to-peer user; and number three, to verify

the file is a valid peer-to-peer file."

That's why you start the download, to verify those three things to make sure that your accusations are legitimate; that you're not creating false positives; that you're not accusing people of engaging in music sharing when they actually aren't sharing any music.

If you scan down that page ten, right below the part I just talked about, you're going to see another section that I've highlighted here at the top of the screen. And that section says, *"As described in the section below, captioned Data Capture and Storage, all evidence will be saved, including, without limitation, packets of data that are received and exchanged during the process."*

You got to save the packets that go back and forth between the two computers.

You may recall Ms. Frederiksen, and this was referenced earlier, did some testing of her own. And you may remember, you may not, but I slapped her expert report onto this ELMO, and I showed you the bit field data that was attached to the back of her report. She kept the packets of data. She kept the evidence. And the reason she did that is because she wanted to prove to you that she actually did the test. And she wanted to prove to you what the results of that test were, what information was exchanged. That's evidence. And that's exactly what the RIAA and the record labels require

to be collected and forensically saved. Rightscorp doesn't do that.

You can see Mr. Boswell's testimony here from this trial. They don't save it. They don't even capture it.

Dr. Cohen says the same thing. They don't capture it. They don't save it.

Now, you are probably sick of seeing this list of things as well, but it's really important. If you flip to page 12 of Exhibit 68, you're going to see this list of all the things that are required to be saved in the evidence package. And curiously, earlier today, the plaintiffs had Ms. Frederiksen up there testifying that Rightscorp saves this stuff. Mr. Boswell doesn't think that they save that stuff. Here he is admitting they don't contain -- that their system does not save step-by-step logs of everything they do. They don't do that. The control communications, he doesn't even know what those are.

He admits they don't save traceroute information. And while he agrees that bit field information is very important to the detection process, he claims they don't save it. Now, we're going to talk more about that later.

A very bizarre part of this case is where the heck those bit fields are, but there aren't any in evidence in this case, and when you go back to deliberate, you're not going to see any. You're going to have access to all the evidence

that's been admitted in this case, no bit field data, not a single shred of it for a single notice.

Dr. Cohen looked at every single one of these elements and concluded that Rightscorp doesn't save a single one of them. Eight requirements, from the RIAA, required to be saved as evidence packages to prove up your case in court, and they've got bupkis, they have zero of the eight.

The last thing I want to talk about in this document is this requirement for an independent review program. And I think it's telling. The RIAA says that this is most important. They say, *"Also, and most importantly, the evidence packages which are held for verified infringements must be accessible online by approved representatives of the organizations selected to deliver the independent review program which is required for implementation of the program."*

Now, when you look at this document, if you look at this document -- please do -- you're going to find that the MarkMonitor system doesn't send out notices that have pay links in it. It's just a notification system. And notwithstanding that fact, the RIAA requires there to be an independent review of the process and the evidence to make sure that it's legitimate, to make sure the evidence is collected properly, maintained properly, not manipulated, not changed.

In this case, Rightscorp is sending out notices with pay links in them. They're motivated to manufacture as many of

these e-mails as possible. Even more of a reason to have third-party oversight, to make sure the accusations are legitimate; that there's no funny business going on. Greg Boswell admitted in this case, no independent auditing for the Rightscorp system.

So that leads to the big question. And I hope it's a big question you ask back when you're deliberating. Where is all the evidence?

You're going to have access to notices back there. If you get them in paper, slap one of those things on the table and ask your fellow jurors, What evidence did you see that supports this notice that this person with this IP address actually shared some song with someone else? Where is the evidence?

These e-mails are nothing more than me sending an e-mail to you accusing your neighbor there of running a red light. There is no evidence at all to support them, not one bit.

Now, the record labels knew this, and that's one of the really bizarre things about this case is that until they filed this lawsuit, the record labels didn't want anything to do with Rightscorp. They weren't working with Rightscorp for years and years.

You just heard from my colleague, Mr. Bart, this impassioned speech, but Rightscorp was never involved with these parties, and these parties never contacted Grande. They bought the data before they filed the lawsuit.

What did the record labels think about the Rightscorp system before this lawsuit was filed? There are three major record labels in this case. The first one is Sony. This is what Sony thought about Rightscorp. Rightscorp was working with companies to milk consumers. Sony wanted to block the activity to stop them from doing what they were doing and at a bare minimum to distance themselves so that no one thought the stink of Rightscorp would get on Sony Music.

This is what Sony thought about Rightscorp before this lawsuit. They're in here telling you Rightscorp is the greatest thing since sliced bread. That's not what they thought before the lawsuit, before they stood to get some money out of this deal.

What about Universal, the second of the three record labels? They declined to enter into a business relationship with Rightscorp out of concerns about their methods. No kidding. They have no problem asking you to award them money in this case, but they didn't ever want to work with Rightscorp because they knew the methods were hugely problematic.

What about the third of the big three, Warner? You heard some of this testimony this morning via video deposition. Mr. Glass told you Rightscorp was having financial trouble and came to Warner with this package deal. Hey, we've got this data. Let's sell it to you, make ourselves a deal here. You can go out and file some lawsuits. Warner said no. And the

representative from Warner, John Glass, didn't find out this case was happening until he was preparing for his deposition in this case.

The record labels couldn't care less about Rightscorp. They never cared about Rightscorp. All they care about now is making a quick buck. That's what this case is.

So what happened? You haven't seen any evidence that the record labels suddenly had this epiphany, they learned the Rightscorp system was the greatest thing in the world. There's no evidence of that whatsoever. What happened is they came up with a scheme, along with the RIAA, to make some money. And so they scribbled a contract with Rightscorp that required Rightscorp to dump a bunch of data and they filed this lawsuit. And they came up with this narrative for the lawsuit. The record labels have lost a bunch of business and it's all Grande's fault. It's all because of music sharing.

You've heard testimony from the record labels about that. These are three of the largest companies in the United States, multi billion-dollar companies. When you go back there, let me know if you see a single document that talks about music sharing harming their business. One document. Look for it. There aren't any.

All we've heard is some very polished witnesses who have been asked to come here as part of this lottery ticket to make money to talk about damage. They want you to buy off on that

so you award a boatload of cash.

But you remember that big graph with all those orange bars with all those CD sales. Technology has passed the record labels by. It used to be when I was a kid I would go to Blockbuster Music -- if you remember that -- and I'd want a song. I'd have to buy a whole CD for 15 or $20 to get that song. And a couple weeks later I would want a different song and have to buy another CD. The reason the record labels were making so much money is because they were bundling their products. They bundled something you wanted with a whole bunch of stuff you didn't, and that let them make more money because you were buying 15 songs when you wanted one.

But technology improved, and then we got downloads, and you can go on the iTunes store and you can spend a buck-29 and get just the song you want or you can pay $9.99 a month for Spotify and listen to all the music you want for $9.99 a month. So it's not surprising that the record labels aren't making as much profit as they used to because they can't bilk us consumers the way they used to. You're getting just what you want and you're getting it at a better price. That's why the record labels' business has shifted. That's why it's changed.

This happens all the time. All kinds of companies have a technology shift that renders them irrelevant. They don't go off filing lawsuits against Grande demanding money. They innovate. They deal with it. They come up with a new program.

But the new program for the record labels is just filing lawsuits, trying to make money. Blaming everyone else for their failure to stay relevant.

And so as part of their case here, they hired a guy named Dr. Lehr to come in and talk about dollars. And they wanted to put the biggest dollar number they could in front of you. And the way they did that was they had Dr. Lehr look at every single notice that was sent in this case to Grande, not just the Rightscorp notices, not just the Rightscorp notices focused on the copyrights at issue in this case. Every single notice he could get his hands on.

And then he found all those subscribers and he calculated how much Grande makes on average on a subscriber over the lifetime that they stayed with the service, $2,448, roughly. And he did some math where he multiplied all that money times the number of people who received any notice and he got $50 million, this big number. That number is ridiculous. It assumes that Grande doesn't provide any service and that the user doesn't do anything with the Internet but share music 24 hours a day, seven days a week, every single bit of data was nothing but music sharing. So they could put that big number out there, hopefully to convince you to award some big number in this case, but it's nonsensical.

When you think about it, think about all the things that you do on the Internet. Grande provided legitimate service to

those customers. They checked their e-mail, they participated in Zoom calls, they streamed Netflix, all kinds of things that they do. But the record labels didn't want you to think about that. They wanted to put a big number in front of you, so they threw up $50 million.

We hired an expert to come and actually assess the damages at issue in this case. And I'm going to pause for a moment and talk about that.

There's been a lot of hand-waving in this case about viral infringement and harm to industries and all this stuff, but this case is about a discrete set of notices we received, a discrete set of copyrights that are at issue in this case. And if you even believe there was infringement and if you believe Grande was responsible for it, what amount should compensate them for that discrete set of issues.

And that's what our expert did. Our expert looked at the notices that were actually at issue in this case and said let's turn those notices into actual iTunes downloads and see how much money the record labels lost. And the answer is no more than $1.2 million. And then he said, well, gosh, what if instead the notices were streaming revenues? No more than $270,000. And what if instead of taking the whole pie and eating it, we think about this rationally and we apportion out only the portion of the Internet usage that might have been used for infringement. Then that value drops from 50 million

down to 1.1 million. These are actual damages numbers.

This is just an attempt to put a big number in front of you to hopefully award a big amount of money. But let's get back to Rightscorp. I've harped on this a lot because it's really important, because these e-mails are the only evidence in this case that Grande received. That's all they have to show you. These e-mails make three accusations: Download, upload, offer to upload. I asked Mr. Boswell about this in this courtroom, and he admitted that not a single one of the notices Rightscorp sent was based on Rightscorp detecting a download, not a single one.

What about the upload? I asked him when Rightscorp sent this notice, had it detected anyone uploading a song?

No, it had not.

Rightscorp accuses people of uploading and downloading songs. It doesn't detect people uploading and downloading songs. It makes that assertion in its e-mail to scare people into paying money, but it's not true.

What about the offer for upload? Two important things to talk about here. Number one, this sentence, *"Your ISP account has been used to download, upload, or offer for upload copyrighted content in a manner that infringes on the rights of the copyright owner."*

Rightscorp was telling people that offering to upload a song was copyright infringement. Not true. When you get the

jury instructions, it's not going to say that. The jury instructions are going to say, *"A copyright owner's exclusive right to distribute its copyrighted work is infringed by distributing any part of the copyrighted work."* You got to share the file. Offering to share isn't infringement. Rightscorp told people it was, to scare them into paying money. They're making false statements about the law.

Now, remember, the RIAA requirements set forth this need to actually start to download the song to prove that someone is offering to share the song. But I asked Mr. Boswell about this during the trial. And what did he say? We don't try to download the song.

They're telling people they were caught offering to upload a song, and they didn't even test that. They didn't even test it. They just sent the e-mail accusing someone of infringement anyway.

But it gets worse. All these notices are the same, so pick any one of them. You'll find the same language. Rightscorp says in these e-mails, *We represent the copyright owner. You will receive a legal release from the copyright owner if you pay. I swear under penalty of perjury I'm authorized to act on behalf of the owner of the exclusive rights that have been infringed.*

Does Rightscorp check to see if the clients it works for even own the copyrighted works its scanning for? Boswell says,

no, we don't. Does Rightscorp even verify the songs are registered with the Copyright Office and eligible for statutory damages before sending these e-mails? No, we don't.

They're making statements that they represent the copyright owner under penalty of perjury, and they haven't even checked. They don't even bother to check. That's the kind of company that Rightscorp is.

Now, what about the evidence? Maybe there's some evidence hidden somewhere inside these e-mails. Not so. I told you at the beginning of this case that series of letters and numbers didn't come from a Grande customer. There isn't a single piece of evidence from anything having to do with the conversation Rightscorp claims to have with a Grande customer that finds its way into these notices, not a single shred. This set of characters and numbers, randomly generated. Greg admits didn't come from a Grande customer.

The file name, same thing. He admits didn't come from a Grande customer. What's more, they knew about it, days, weeks or months before this e-mail was sent. Not evidence.

The other interesting thing you may recall -- and I was puzzling over this. I made a big deal out of bit fields and, in fact, Rightscorp doesn't have them, and they know that's a big issue in this case, and so when Mr. Boswell was on the stand, he sold you this yarn about how the bit field is in the file name, whatever that means. And I asked, is it in the

letter A? Like, where is it? What are you talking about? And this just proves the point that that's not true. They had this file name -- in his own words -- days, weeks, or months before this e-mail was sent. How does it have the bit field data in it if they had it before they ever contacted, allegedly, that computer? There's no bit field data in this file name. That's bunk. That's made up to try to confuse you. There's no bit field data.

The IP address. That doesn't come from a Grande customer either. Greg Boswell says, no, Rightscorp did not learn about that IP address from a Grande customer. What about this date and time? That didn't come from a Grande customer either, and more gallingly, this isn't the date and time of any file transfer. I asked Mr. Boswell those very questions. Is this the date and time of the download or an upload? Nope, sure isn't.

What the heck is that about? So let's assume for a moment that Grande could investigate these things. It can't. We'll talk about that. You've already heard from Mr. Horton and others about that, but let's assume for the moment that they could. They're going get this notice. They're going to go back in their magical archives of data, which doesn't exist, but let's say they could, and they're going to look at this date and time and see if there was a file transfer. Are they going to find one? No. Because none happened. The e-mail is

totally manufactured.

And that's a big main point here. When you go back to deliberate, please ask that question. Can the record labels prove that any individual accusation is legitimate? There is no evidence. What they want to do is have you assume infringement happens on the Internet and then just gloss over all the actual requirements for the law. They want you to assume the notices are right, but that's not what your job is here.

Your job is to look at those notices and determine whether they've met their burden of proving that any one of those notices is legitimate. And that means they have to show you evidence. Just like the red light. You got to see evidence. And there isn't any evidence to show you because Rightscorp either never had it or deleted it.

I've already talked about these notices. I'm going to move past this slide, but please take a look at these when you're deliberating. The notices are crazy. There's no evidence to support them.

Now, the plaintiffs have the burden of proving these notices are legitimate, and so it would be enough for us to sit back and say, Rightscorp doesn't have any evidence. They can't prove their case, job done. But we've shown you evidence, affirmatively, of notices being manufactured that are false. And one of those is the 10 percent bit field problem. This is

a major issue in this case.

I used this hypothetical with Ms. Frederiksen where someone pulls two songs out of the payload, but the rest of it is empty. And I talked to her about this 10 percent bit field manipulation that Mr. Boswell developed that goes into the database and affirmatively flips switches to change the evidence that they claim they collected.

And I want to pause there. Remember, harken back to that RIAA document about the auditing of the evidence, right, to make sure it's forensically sound. In this case, we have Mr. Boswell going in and changing the data. He's not auditing. He's going in and affirmatively manipulating it. And so I asked Ms. Frederiksen about this 10 percent bit field thing, and she agrees, because in this hypothetical I gave, two songs are present, more than 10 percent. What's the system going to do? Well, the 10 percent bit field rule is going to change all those Xs to check marks. The Rightscorp system is going to assume that user has all those files when they don't even have them.

Then I asked her, well, then what's going to happen after that? And she admitted it's going to send out a bunch of letters. So Rightscorp is going to send a letter on every single song in that payload when the computer doesn't even have it. It's eight e-mails, false. This one user, this one day, and they're going to do that every single day. Eight a day, 56

a week, if my math is right, firing out the door from Rightscorp, totally false, totally fabricated, totally illegitimate.

So that poses the next question. How many of these e-mails were affected? Maybe there was just one of them. We can forgive that. Now, there's no evidence, of course, of how many entries in the database were impacted by this, because Rightscorp doesn't log anything. And Rightscorp doesn't save any evidence, so there's no way to actually know. But when he was deposed by me, Mr. Boswell said, well, 10 percent, 10 percent bit field affects 10 percent of the entries in the database. Now, of course, there's no way to verify that, right? Because there's no facts. There's no evidence. This is the whole problem with the Rightscorp system. You can make up whatever facts you want because you can't be second-guessed with the actual evidence. You can just say whatever you want.

So he said whatever he wants, 10 percent. Now, he has a motivation to make that number small, right, because he wants the Rightscorp system to seem legitimate because he's on this gravy train where he gets paid to prepare and testify in these cases, so he says 10 percent. It's probably more. We have no idea.

I asked Ms. Frederiksen about how many are processed at a time, and you may recall it's a hundred thousand every 15 minutes. They had to put a cap on it because if they left it

uncapped, it would crash the computer. That's how many times this thing was buzzing around in the database changing and manipulating the data. So if we do the math on that, assuming Mr. Boswell's 10 percent, that's 10,000 extra e-mails every 15 minutes. That's 40,000 every hour. Okay. Well, maybe they were only doing it for a couple hours. That wouldn't be so bad. How long was Rightscorp doing this for? How long was Rightscorp going into the database manipulating the data and sending out extra e-mails?

Before I get to that, I'm going to have a little side note here. When Ms. Frederiksen was here testifying, I asked her a first question, and it was: *"Would you agree with me that your opinion is only as good as the information you have to rely on?"* And she said, *"That's a fair statement."*

It is a fair statement, right? One of the experts for the other side had this phrase. I don't remember which one it was, but it was *"Garbage in, garbage out."* I don't know if you remember that. I like that phrase. *"Garbage in, garbage out."* Let's talk about some garbage.

In this case, Mr. Boswell testified under oath, in front of all of you that this 10 percent bit field rule was only in effect for two weeks. Quick experiment. Just flip the switch a couple times, no big deal.

But in July of 2015, he gave a deposition in another case. And in July of 2015, he testified the 10 percent bit field rule

had been in effect since 2015. Seven, eight months of activity with the 10 percent bit field, and as he was sitting in that chair giving that deposition, it was still running.

Now, when I impeached him with that testimony, what was his excuse for the change? It's highlighted at the bottom. *"If I said since 2015, it was a slip of the tongue at that deposition."* A slip of the tongue. I have never said this before in a trial, but this man lied to you and he lied to you two different times right here.

Number one, he lied when he said that the bit field rule was only in effect for two weeks in 2014, and then he lied to you when he told you that the other answer he gave was just a slip of the tongue. Those are false statements under oath.

How do we know it? Ms. Frederiksen was also in that other case. Everybody is on the gravy train. And in that case, Ms. Frederiksen issued an expert report, couple weeks after Mr. Boswell testified. Her expert report said the same thing. She looked at the source code, she looked at the production, and she said used a hundred percent bit field before December 2014, now uses 10 percent bit field. This is now the end of July 2015.

The bit field 10 percent rule is still in effect. That wasn't a slip of the tongue from Mr. Boswell. And these expert reports, they don't just get spit out willy-nilly. There was a ton of time and attention put into manicuring these expert

reports, having experts look at it, lawyers look at it. The witnesses who contribute facts to it, they look at it. This was not a slip of the tongue.

But the fact of the matter is, in this case, that 10 percent bit field problem is smack dab in the middle of the liability period, and it's a big, ugly problem for Rightscorp and the record labels. So Mr. Boswell has to do something to minimize that issue. Because it's right in the middle of this case. So what does he do? He says, Oh, it's just a couple weeks. And he thought he could get away with it because there's no evidence. There's no records. There's no logs of anything. So whatever he says goes, because Rightscorp's system is not legitimate, it doesn't document anything. There are absolutely no records. So Mr. Boswell can say whatever he wants and he thinks he can get away with it.

And then Ms. Frederiksen has to follow suit. She issued an expert report in this case that said the same thing Mr. Boswell did. Oh, well, they relax the rule for one or two weeks. It was an experiment, but then, man, they turned it right back to a hundred percent, don't you worry. What? She issued an expert report in 2015 that said the exact opposite thing.

Mr. Boswell says something in 2015, her report mimics it. Mr. Boswell says something in this case, the report mimics it. Now, I don't even fault Ms. Frederiksen for this because there's no evidence for her to look at. The only thing she has

to go on is Mr. Boswell's say-so. Whatever he says goes.

I cross-examined Ms. Frederiksen about this at this trial. And I introduced these two contrary answers, and she admits, I observed that here. I observed that change in testimony. And then she admits she changed her opinion based solely on his changed testimony. Garbage in, garbage out.

We also know that Mr. Boswell didn't just have a slip of the tongue because Ms. Frederiksen confirmed in this case he's changed his testimony. He lied under oath in a court of law regarding the bit field story. And because there's no Rightscorp records, he's the only source of information about how the system works. You've heard loads of testimony about that.

So the person we're supposed to rely on to understand that this Rightscorp system is legitimate is the same person we've caught lying under oath. And Ms. Frederiksen admitted during this trial that the result of that lie under oath is that it minimized the impact of the 10 percent bit field rule. It minimized the amount of time that these false e-mails were being sent. And of course, I asked her about that. Goes without saying, the longer the 10 percent bit field rule is in place, the more harm it's doing, the more data it's manipulating, the more false e-mails it's sending.

So back to the big question. How long has this 10 percent bit field data rule been in place? The answer is, we have no

freaking idea. During this trial, the witnesses have tried to say, well, it couldn't have lasted past October of 2015. There was this Memphis and Pocket code and things changed, but that's all based on Mr. Boswell's say-so too.

And when I impeached Ms. Frederiksen about this, her testimony admits she would be speculating. She has no idea when it stopped. She doesn't see anything, sitting here, that tells her dispositively when or if it ever stopped.

When Dr. Cohen was here, I asked him to come off the stand. He went back there, and he looked at the source code. He showed you a couple of things. For example, where the bit field data was backed up. We can talk about that in a bit. But he also showed you this code. This is the code that executes that re-evaluate full file being zero, the thing that goes in and sets off the 10 percent bit field rule and manipulates all the data.

And he pointed out that this command, *"ON COMPLETION [NOT] PRESERVE"* turns off logging. Mr. Boswell could have typed less letters and had logging on, could have just not typed that "not," and then we'd have logs. We would know how often this ran. We would know how many notices were potentially impacted. We could get some actual answers, but Mr. Boswell took the affirmative step of typing that "not," so there was no logging. Who does that?

This is a system designed to take money from people and

accuse them of doing something illegal, and he's turning off the logging, because he knows he's being a bad boy. Mr. Boswell knows, and the plaintiffs in this case know, the 10 percent bit field is a big, big problem. And that's why Mr. Boswell didn't log what was going on in the database when he was doing all this funny business and that's why he tried to change his testimony to minimize the impact.

Let's talk about something related, but different. I call this the mystery of the missing bit field data. So also during this trial, I asked Ms. Frederiksen if the bit field data would help us resolve this 10 percent bit field mystery. Right? Trying to figure out how many notices were affected by the 10 percent bit field rule. Well, she admits the bit field data is the key. I call it the secret decoder ring. And she agreed it would tell you which specific pieces of the payload a particular computer had. And I asked, And we could back out from that how many notices Rightscorp sent based on the 10 percent bit field rule? She said, Yup.

If you have the bit field data, you can figure out what's going on. The bit field data is the secret decoder ring. It's the master truth data. That's why the RIAA documents require it to be saved in an evidence package, by the way.

I forgot I had this slide. There it is. Now, when Dr. Cohen was talking to you, he also showed you the source

code that backs up the bit field data. And I know not everyone is a computer programmer. Probably for the better of the world. But Dr. Cohen showed you this *"table name comma now,"* appears right there. Blown up at the bottom. What that does, Dr. Cohen explained, is it makes a copy of the table that has all the bit field data in it and then it puts a date and timestamp at the back of it, and it saves that table to the database, so it does this every single day. Every day the Rightscorp system is designed -- designed -- to save these tables as backups.

Now, during her deposition, Ms. Frederiksen first thought, no, the system just deletes the bit fields. But I asked her to look more carefully at the source code, and she then agreed with me, it creates a backup. She says, yes, a copy is made of torrent infractions -- which is where the bit field is saved -- before the table is deleted.

During Dr. Cohen's testimony, you also saw this Rightscorp RFP response. So back in 2011 when the RIAA put out an RFP, request for proposal, to do this monitoring, right, and set forth these requirements for evidence packages, saving all this data, saving all the packets, independent monitoring and auditing, Rightscorp was one of the companies that responded to that RFP with a proposal. And as part of that proposal, Rightscorp submitted information about how its system works.

And you can look at this. It's Defense Exhibit 15. It's

going to be back there with you. If you flip to page 40, you will see this information. Page 40 has information from Rightscorp stating that the bit field data is retained indefinitely by the system.

But we don't have any bit field in this case. There's no evidence of it, so where the heck did it go? The source code backs it up. Rightscorp told the RIAA it's preserved indefinitely, and yet no bit field data. When you go back to deliberate, you're not going to see a single shred of it, so where did it go?

Both the experts in this case, Ms. Frederiksen and Dr. Cohen, have scoured the source code, and there is zero source code that deletes those backup tables. The only other explanation is that someone deleted the tables manually, went in and removed them. And Mr. Boswell is the one who has access.

Now, Ms. Frederiksen wasn't given access to the database. She's the plaintiff's expert. You think she'd be given free reign to look at all the stuff in the Rightscorp system, see what's going on, get the answers to legitimize their case. But I asked her whether she had independently searched the Rightscorp system for any trace of bit field information, and she said no. And the answer was a curious one. *"I have not independently gained access to their system."*

What does that mean? Did they not let her see it? *"I have*

not independently gained access."

Are the bit fields still sitting there and she just can't see them? Ms. Frederiksen said she had no choice but to take Boswell's word for it. Mr. Boswell says they don't exist. He says he searched for it and couldn't find them. Gosh darn, I guess there's no bit field data.

But the only person we have to rely on to know that the bit field data doesn't exist is Mr. Boswell, the same guy who lied under oath in front of you in this very courtroom.

Now, I think it's worth noting here Ms. Frederiksen holds herself out as the director of forensic services for the company she works for. And a computer forensics person is the kind of person who is hired to dig into an old closet with some old computer back there that someone had deleted all the data off of, and they get that computer, and they take the hard drive out of it, and they recreate the data. They are tenacious people at finding things, and yet she didn't even look at the database. She just took Mr. Boswell's word for it. That is inconsistent with her position. That is not how a forensic computer scientist operates. Something fishy is going on here. And I will tell you, sitting here today in this courtroom, I've been working on this case for a long time. I don't even know whether the bit field data exists or not, and that's crazy.

The source code says it's backed up. Rightscorp told the

RIAA they save it indefinitely and yet we don't have it in this courtroom. And it's the key data that would answer the question about the bit fields, it would answer questions about which of Rightscorp's notices are legitimate and which ones aren't. It's the truth data and it's not here, and there's no evidence it was ever deleted electronically. The only possible conclusion is that Mr. Boswell either deleted it or told everyone it was gone so we couldn't see it in this case.

This is the evidence. This is the system that the record labels bought and are trying to convince you to give them money for. It's preposterous, frankly. The labels and the Rightscorp system folks do not want you to see any of this bit field data because it would reveal just how problematic these notices are. And you heard during Mr. Bart's closing argument that we haven't identified a single instance of a notice that was sent out wrongly. Well, no kidding. How are we supposed to do that when there's no evidence? If we have the bit fields, we could look at them, and we could know. But they're using the fact that the evidence is all gone against us. That's backwards. They should have to produce the evidence to prove their case. But instead, they're trying to use the lack of evidence to win their case.

Let's talk about downloads. The record labels like to point to downloads and say that the downloads are the reason they win this case. The downloads are the reason that the

Rightscorp system is legitimate. I showed you this slide in my opening statement, these three different steps of the download process.

First, the Rightscorp system claims it reaches out -- or identifies a list of targets, rather -- that it's going to go after to try to download songs from. And then Rightscorp claims it reaches out to those computers and has conversations with them. Packets of data that the RIAA requires their own detection company to keep. And Rightscorp will admit they're failures. They reach out, and they can't get the song.

You were here when I asked Mr. Boswell about this download process. And he admitted Rightscorp doesn't have any evidence to show how often it tried and failed to download songs. And I proposed these hypotheticals. Could it have failed a hundred times? This is true. 10,000 times? This is true. 50,000 times? This is true.

And he admitted Rightscorp has zero evidence from which you can determine which of those numbers is correct. Could be a hundred thousand, could be a million. We have no idea because Rightscorp didn't save any evidence, didn't save any of its logs, didn't save a list of the targets it was going after or the instances in which it reached out and failed or any of the packets of data that went back and forth. Zero evidence of the downloads. All we have is this hard drive of songs.

Guess where that hard drive of songs came from?

Mr. Boswell, once again. No one else pulled that stuff. No one else saw the database. Mr. Boswell handed over a hard drive and said, Here's the songs.

There is no trace of evidence for where any of those songs came from. You won't see a single shred of it when you go back there, not one shred. Their burden of proof. They've got to prove where those songs came from. They can't do it. There's no evidence. All this evidence, if it ever existed, right in the trash can.

Rightscorp accused 9,000 subscribers of sharing the music at issue in this case. But even if we assume for a moment the songs came from Grande customers -- and there's no evidence of that again -- they only got songs from 492 of them, 5 percent. And the record labels want to hold out this as evidence that that Rightscorp system is rock solid.

But ladies and gentlemen, that's missing half of the puzzle. It's only rock solid if they only tried to get songs from those 492 people. But as I've already talked about, Mr. Boswell admitted they didn't keep track of how many times they failed. They could have tried to get songs from all 9,000. There's no evidence. And so once again, the record labels are using the lack of evidence against us. Well, you can't show how many times Rightscorp failed, so we got songs, we're all good here.

If Rightscorp tried and failed 50,000 times to get 50,000

songs, that's a 50 percent success rate. 50 percent of the notices are wrong. They're missing half the puzzle and they're trying to ask you to conclude from only the half that their evidence is rock solid. That is not logically sane.

And we have evidence of instances in which the downloads were affirmatively failures. There are instances where Rightscorp would send out an accusation, accuse someone of sharing a song, would reach out to try to get it, and get a picture. And you heard from Mr. Bart, they consider that a success.

The notice accuses someone of sharing a song file, and when Rightscorp itself went out to try to get it, all they got was a picture. That's not a success. That's a false accusation of infringement and we found 1200 of those. We don't have logs, we don't have records. This is just the tip of the iceberg. You saw that iceberg picture they showed. Yeah, under the surface is a whole much more of this, but they destroyed all the evidence so we can't see it. And they're using the lack of evidence against us.

Well, Grande can't prove there were false accusations. Grande can't prove we didn't download the file when we tried. They deleted all the evidence. Of course we can't.

Now, the other important thing to remember about the downloads is we were never told about them. We got a whole bunch of notices accusing people of sharing songs. Rightscorp

never sent us this hard drive of downloads and they certainly never sent us any evidence of where those downloads came from because, of course, there isn't any.

And so this case is a secondary liability case. That means we didn't do the infringing directly. We have to know about the infringement to be liable. But we never got this hard drive of songs and we never got any evidence about where they came from.

During this trial, Mr. Boswell tried to suggest we did. And he gave testimony for the first time at this trial that it was in the dashboard link. Typically, the dashboard link includes song files that they got from the swarm, from some other group of people. But during this trial, Mr. Boswell testified for the first time on that stand that that dashboard also included the files that were downloaded directly from Grande customers. That was new.

But conveniently, because he was out of town, he shut down the server, so we couldn't click on the link to go in there and cross-examine him on that fact. He turned off the Web server so we couldn't go prove him wrong. This is 2022. He can't maintain a Web server from somewhere else? It's a Web server. It's connected to the Internet. Why is that off?

Let's switch gears and talk about Grande for a minute. I mentioned this is a secondary liability case, and there's a requirement for knowledge. And that's focused, for the most

part, on Grande.

During this trial, I hope we've convinced you Grande has no way to investigate these accusations. Now, the record labels have given testimony suggesting that the only time we should terminate someone is if the notices accurately reflect the facts that the users had, in fact, infringed. That requires Grande to know those things.

You learned a little bit about Grande's business, about all the computers and how they communicate, cable modems, wireless routers, and Grande is just a big fancy message-passing machine. Its job is to move packets of data back and forth as fast as it possibly can. You heard from Mr. Horton that Grande moves four and a half petabytes of data every single day. That is a huge, huge amount of data. He gave that example of the row of books wrapping around the earth twice. That's every day that's how much data moves through Grande's system.

It is impossible, it is impossible for Grande to know what its customers are doing and it is impossible for Grande to investigate these accusations itself.

You heard from Mr. Horton. He said we have no way to know whether individual Rightscorp accusations are true or false. And remember, the information in the Rightscorp e-mail isn't even true. That date and time, if we were to go look, that's not even when a file was shared. So even if we could investigate it, it would still be impossible. But we can't

even start because we can't look at any of the data. There's too much of it. A computer can't accept it all and process it. That's not how it works.

So Mr. Horton said they have no way of knowing whether Rightscorp accusation is true. Mr. Bloch said the same thing. Mr. Fogle said the same thing. Mr. Rohre said the same thing. I know a lot of people think because they're sending their data to the Internet service provider that the Internet service provider knows everything. They don't. They can't. And these people genuinely were telling the truth that Rights -- pardon -- that Grande does not know what its customers are doing, doesn't know what you're searching for. It doesn't know advertisements you're looking at, doesn't know what videos you watch on YouTube. They have no idea. They're doing everything they can to get that data moving through the network as fast as possible.

Mr. Horton said this directly. I asked, *"Does Grande unpack and read any of the data that it sends back and forth on behalf of Grande customers?"*

"Absolutely not."

And I've heard people think -- as I talk about this case a lot. I've heard people think, Oh, well, there is some screen at the ISP and they can just turn that screen on and see what's on your screen. Absolutely not. Grande can't do that.

COURTROOM DEPUTY CLERK: Fifteen minutes.

MR. BROPHY: Grande also admits, through Mr. Horton, they don't have any logs. You heard Mr. Boswell, say, Oh, the ISP usually keeps logs. There's no logs. There are no logs that show this stuff.

Mr. Horton explained that the way that this works because of cable modems and the DOCSIS standard talking to these CMTS machines, you can't just pluck one bit of data out of the stream. You've got to absorb all of it. That's how the CMTS and DOCSIS data works. So to save any data, to collect and look at any data, you've got to grab all four and a half petabytes a day. Can't do it.

So Grande doesn't know what its customers are doing online. Grande can't know what its customers are doing online, and Grande has no way to investigate whether these Rightscorp accusations are true or false, so what does Grande do? It flounders, it flops around, it doesn't know what the right answer is. It's getting accusations on one side. It's hearing from its subscribers that say they didn't do it on the other side. There's no good answer because Grande is stuck in the middle.

You heard from Mr. Shockley. He's the boots-on-the-ground person who actually talks to these customers when they call in. And he said the customers call in and say, *Why is this happening? I'm not doing this. What's going on?* He said everybody denies this. Grande has no way of

knowing whether they're telling the truth. Just like Grande has no way of knowing whether Rightscorp is telling the truth.

I used this graphic at the beginning. Grande is stuck in the middle. We have no idea who's telling the truth and not. We have no way of investigating this stuff. So Grande did what it could. It educated customers. It sent out letters saying you have this accusation against you. If you need help, call us. We've got people who are going to help you figure this out. People like Mr. Shockley. Give them a call, he'll try to help. Those are not the words of a copyright infringer.

Mr. Shockley explained that they would -- even if it wasn't their hardware, they'd go out on the Internet and find user manuals and try to help people change their WiFi passwords. Is that the behavior of a copyright infringer, trying to help their customer to secure their network so there is no infringement?

This approach Grande has adopted is working. Mr. Bardwell, the labels' expert, testified that the average Grande customer engaged in alleged infringement. That alleged infringement lasted 46 days. They're not on here forever sharing music. Forty-six days. That's it.

And another one of the record labels' experts concluded that the average customer stays with Grande for 3.2 years. You do that math, they're only allegedly infringing for 4 percent of the time. Grande is educating its customers and

helping them make it stop if it's actually happening. You don't have to terminate people. There are other solutions to the problem. 4 percent. That's it. But the record labels' entire case is built on this notion that we should just blindly terminate people.

You heard from Mr. Walker. The question was, *"So in your view, Grande is obligated to take all those notices it receives at face value?"* He says, *"I guess so, yes."*

At the beginning of this case, I talked about the way this is supposed to work. There's an accusation. The accuser presents evidence. That's that evidence package that Rightscorp doesn't have. Then the defendant gets to defend itself. Maybe they say they didn't do it and they hand over their computer to be scanned to prove it, and the Court weighs that evidence and decides whether they're innocent or guilty and, if so, what the punishment is.

The record labels' program, skip all that. You've got an accusation, start punishing people. Don't get the courts involved. Don't let anyone actually defend themselves. Just start punishing people. So they spent a ton of time in this case -- you heard Mr. Bart's closing -- a ton of time talking about this repeat infringer policy and the notion that Grande shirked its obligations by failing to terminate people based on accusations. Accusations.

You saw e-mails from tons of employees talking about

safe harbor and you heard them say over and over that we were -- I don't know all the words Mr. Bart used, but they were harmful words about Grande based on the notion that we hadn't done what was right by blindly terminating people based on mere accusations. But all of that is a complete and total sideshow.

When you go back in there to deliberate, please read Instruction 13, that DMCA safe harbor, which arguably requires terminating people blindly based on accusations, that's something we call an affirmative defense. It's optional. And the fact that we didn't take advantage of that optional defense does not make us liable. They want you to think that. They want you to think there's this binary option. Either we did a repeat infringer policy or we're liable for copyright infringement. That is not the law. Please read the instructions.

Everything about this safe harbor has been a complete distraction and a complete sideshow because they think it's going to persuade you that we were bad actors. Read the instruction. Attempting to qualify for the safe harbor is optional. It is not a legal requirement and the fact that Grande decided not to do that, not to blindly terminate customers, does not make us liable.

I think it's interesting Mr. Bart -- during Mr. Bart's closing, he didn't show you the jury instructions. They want you to focus on that safe harbor that doesn't apply, but this

case has to be decided based on the jury instructions, the actual requirements for copyright infringement.

There are three elements that matter. The first one is that they own the copyrights. Court decided that there's no dispute. The second, third, and fourth elements of copyright infringement are key. The second element requires them to prove that Grande's customers actually shared music. And the only evidence they have is those Rightscorp notices and there is no evidence to back them up. They're also going to point to the downloads and say, Well, there's evidence.

Well, there's no evidence to back those up either. Mr. Boswell is handing out these things like candy on Halloween. There's no evidence of where any of it came from. It's their burden of proof.

Now, the third element -- second one I'm talking about, but the third element in the instructions, as far as I'm concerned, you can look at this element, you can decide this case in Grande's favor and you can go home. Because this element requires knowledge.

This specific language of the instruction is Grande has to know of specific instances of infringement or be willfully blind to them. Let's talk about each of those in part.

Knowing about specific instances means you -- Grande actually knows. This isn't the e-mail sent about the person

running the red light. You have to actually know in your brain that these specific instances of infringement occurred. All Grande got were notices. All Grande got were accusations. You've heard tons of evidence about the fact that Grande can't know, it can't investigate these things, it doesn't know what its customers are doing. Grande doesn't know and can't know about specific instances of music copying.

The only other option here is willful blindness. Mr. Bart used that word a whole bunch in his closing. He used it incorrectly. Willful blindness is when there's a fact right in front of you, and you close your eyes and decide not to look. But willful blindness requires you to be able to open your eyes and learn the fact. Grande can't be willfully blind because it can't open its eyes and learn the fact. We don't know what our customers are doing. We don't know whether these accusations are true or not. Willful blindness requires you to be able to unblind yourself and that can't happen in this case. We can't know whether a single accusation is true or false.

This third element is the reason Grande wins this case, period, end of story. We don't know and we can't know. That's why I love this phrase so much: *"Knowing about an accusation is not the same thing as knowing that it's true."*

We know about a boatload of accusations. We don't know that a single one of them is true and we have no way of figuring that out.

The last element requires, in their words, "material contribution." We weren't materially contributing. We had a Call Center. We were sending out letters. We were helping people stop it, if it was happening. That's not material contribution.

And the instruction says there have to be basic measures Grande can take. Basic measures aren't blindly terminating customers. By that logic, Grande might as well just shut off everyone's Internet and go home. You have to be precise about it, you have to be accurate, and that means you have to know. You've got to be able to do some investigation to figure out whether the accusations are true or not so you're not blindly terminating people. There are no basic measures that you can engage in to accomplish that, none. Grande is not materially contributing either.

Please look at the jury instructions and don't pay attention to the sideshow, which is the DMCA safe harbor. They're hoping to use that against us. That's an affirmative defense. It is optional. The only way Grande is liable is if they can check these boxes on these requirements, and they can't, because Grande doesn't know and Grande can't know.

So at the end of this case, you're going to get a verdict form. I would very much like you to check that "No" box. There is no evidence to support the allegations in this case. Thank you.

THE COURT: Thank you, counsel. You can go right into your --

MR. BART: May I have five minutes, Your Honor?

THE COURT: Yes. We'll take a quick five-minute recess.

COURT SECURITY OFFICER: All rise for the jury.

(4:42 p.m., the jury exits the courtroom.)

* * *

(4:51 p.m., the jury enters the courtroom.)

COURT SECURITY OFFICER: All rise for the jury.

THE COURT: Please be seated. All right, ladies and gentlemen. It's now Mr. Bart's opportunity on behalf of the plaintiff to make his rebuttal argument. As I told you, it's not a question of fairness. It's because the plaintiff carries the burden of proof.

So Mr. Bart has 15 minutes, and then that will be the close of all matters other than your deliberations. Okay?

All right, Mr. Bart.

MR. BART: Thank you, Your Honor. And hello again. So when I was talking to you a little while ago, I said everything that you're going to hear is manufactured after the fact; that between 2010 and 2017, Grande had a policy of willful blindness where they didn't look at anything. They didn't care to look at anything. They didn't forward Rightscorp notices. They didn't take any action with regard to

any other notice other than passing them on.

And the very detailed response that you've heard from Grande's counsel just proves that point, that basically what they've done is they trampled on the property rights of copyright owners for seven years. They've hired somebody to come in and do a retroactive audit and try to argue all the different reasons why Grande might not have known about infringement at the time, if they were paying attention. But the fact is that they weren't paying attention. Nothing was happening at Grande between 2010 and 2017 other than silence.

They're trying now to make a big deal about this Call Center. The Call Center was something that we heard very, very little testimony about. And, in fact, what Mr. Shockley testified about was that he didn't call anybody, that Grande didn't call anybody. He responded when people called him. He had no idea how many times that this happened. He had no details of any specific conversations, and he gave you a general answer. That's the best they got. These are the people that want details, they want logs, they want dates, they want times, they want people. But when they're trying to justify their willful blindness of seven years, they pop somebody on the stand and go, *Oh, yeah, everybody complained.* And that's supposed to be good enough.

What we do know is that for seven years they got notices, not just from Rightscorp, but from all other types of

companies and they just did nothing. They either just forwarded them to their customers, or in the Rightscorp case, they didn't even do that, so when you talk about all of these things that they're saying, how can we know whether it was right or -- they didn't care at all. They were completely blind to the fact that there was lots and lots of specific infringement that they were getting notices about and just ignored it completely.

Now, let's talk about those notices just for a minute because they said there's no information that's provided to you in these notices, but in fact, Rightscorp proves exactly what Grande says it does. The notice has the IP address, which is just like the Grande license plate. It has the port and the time, which is just like being at this intersection. And most importantly, it has the torrent hash. The torrent hash is the hash matching that gives you the certainty that this notice is doing what it's supposed to be doing.

It has forensically matched, the system has forensically matched the hash value for the torrent with the hash value on the user's computer. And it's done that every time. And we have two experts who have looked at this and they both agree, yes, it does. So we have undisputed evidence that the Rightscorp system is programmed to and, in fact, operates to identify infringements accurately and passes those notices on.

Everything that you've heard here is an after-the-fact excuse that nobody at Grande ever knew. We asked Mr. Horton, *"So before this lawsuit was filed, Grande had no awareness of any factual basis that the Rightscorp system was inaccurate; isn't that correct?"*

"We had no knowledge of that."

"And before this lawsuit was filed, Grande had no awareness of any facts to support an assertion that Rightscorp system was incapable of detecting copyright infringement; isn't that correct?"

"We had no knowledge on any of the systems sending us notifications, including Rightscorp."

They didn't look, they didn't care, but they could have if they wanted to, because Rightscorp invited them to. Rightscorp sent them a letter saying, Please work together with us. Please be our partner in all of this, because there's massive infringement going on out there, and you're the only party that can put these pieces together.

And, in fact, that's why the DMCA was created was to try and create some sort of partnership between the content owners and the ISPs. And Mr. Brophy just talked extensively about the DMCA and misled you quite a bit in saying they chose not to seek it. They pled it as an affirmative defense in this case and they lost. So the notion that they were just opting to go a different way, not true at all.

And what the DMCA was meant to do was to make these parties work in partnership. Just like Rightscorp was trying to make them work in partnership, but Grande and its corporate parents don't want to work in partnership. They want to be able to ignore it. They want to be able to come back after the fact and try and pick holes, because they want the subscription fees from every one of those infringing consumers, and they don't care about what they're doing to the property rights of other people. And that is the bottom line.

They could have done something about it. They could have availed themselves. That safe harbor was meaningful. Why do you think it exists? It exists because ISPs wanted it. They wanted it because they didn't want to be in a courtroom like this facing evidence like this and saying, Well, we need a way out of this. We don't want to be the judge. We don't want to be the jury.

And the DMCA gave them that option. It said if you take that simple step of terminating repeat infringers, and one or two other minors points, you can get on safe harbor. You don't have to do anything further. Okay? But they chose not to do it.

And so now they are responsible because they were willfully blind. They materially contributed by giving all of this Internet service to known subscribers. And with regard to the infringement by their users, Mr. Brophy read a very

interesting subset of the instruction on infringement. He said to you that *"A copyright owner's exclusive right to distribute its copyrighted work is infringed by distributing any part of that copyrighted work."*

What he didn't read was the next paragraph, which says, *"Plaintiffs are entitled to rely on and you are permitted to consider evidence that copyrighted content was offered or distributed to a third party who is investigating or monitoring infringement activity."*

Pretty important words to be leaving out when they're telling the jury what the instruction is. And that happened with almost every other quote that you heard today. There was selective quotations from people out of context. And don't believe the testimony that you've heard because it's just like this. The law is that we are entitled to rely on the fact that copyrighted content was offered to a monitoring company as evidence of direct infringement. And that's exactly what happened here. You have knowledge, you have direct infringement and you have material contribution.

Forgive me if I'm not quite as organized as I was when I was giving my original speech, but that's the way that rebuttals sometimes work.

So in addition to the accuracy of the notices, we also had a bit of discussion about whether or not these Rightscorp notices were accurate when they said that we've detected users

downloading, uploading, and offering to upload.

Now, clearly, the offering to upload is correct. But every one that is on BitTorrent is, in fact, at that same time, uploading and downloading content. As a matter of fact, that's what you're doing in that swarm. You are part of that process. So they made a big deal out of this as though we need to prove all three. We've proven the uploading. And every one of these users was, in fact, downloading and uploading at the same time. That's what BitTorrent is all about and that's the way it's always worked.

Now, with regard to the -- and one other thing about the instructions. When they were talking about -- the same way that there was an error in terms of the direct infringement point. When we get to the knowledge point, it says, *"The term 'willful blindness' means that there's a high probability of a fact that they deliberately take steps to avoid learning it."* And that's precisely what happened here. There was a very high probability from the millions of notices that were being sent, and all of the notices being sent by everybody else, that there was a specific infringement going on, and they took steps to avoid knowing it.

Now, Mr. Brophy added another element. Willful blindness requires an ability to know. Well, that's not in the instruction and that's what willful blindness is. That is Brophy on knowledge. And that's not what the law is before

you. You have to decide this case based on the instructions that are in front of you. And what you have here is a paradigm of willful blindness.

You have a decision made in 2010 to just allow piracy to go rampant on the network and to take no action against it whatsoever. And they admit it. They admit that for those seven years they did nothing. They terminated no users and they didn't even follow up on them. They didn't even notice for five years that they weren't sending the Rightscorp notices at all. This came as a major shock to them because they just figured they could turn it off. They could put some poor guy into a Call Center to answer some phone calls. But if people don't call up, what do they do about it? They let people run up tens of thousands of infringements and then they hire a lawyer after the fact and say, Can you figure out some way that I can get out of this?

Well, that's not the way the law works. They knew what was going on on their system. They provided the mechanisms for it, and the best evidence of that is what they did before and after this time period.

Before this period, they had a very robust policy for dealing with infringement. They would terminate and suspend users. They would speak to the user. And afterwards, afterwards, in 2017, what do they say? You've heard before the DMCA is a sideshow, it's a distraction. What does Grande say

in the 2017 policy that they enact? *"It is our obligation under federal law to implement a repeat infringer policy."* They want to run away from that as far as they can, but they know what the law is, and the law is the way that it's presented to you. So don't let all of this sideshow get in the way.

Now, the most important thing, perhaps, although there are many important things and misstatements that were made in that presentation, are the downloads. Because the downloads ultimately kill them. Right? They're talking about how is there any proof of infringement that we -- on our system? Well, we have the actual tracks that were pulled down from their users.

And this isn't Boswell saying this. Their own experts said it. Cohen said these are files that were extracted from Grande's users. Ms. Frederiksen said it. The source code tells you how it's done. And all of this is before you in evidence in Plaintiff's Exhibit 5. It has the data. *They could have just made it up.* Well, they made up an awful lot, because this data has the IP address, the date, the time, the TC number that I told you about, and it was extracted pursuant to specific instructions within the source code. It's been in the source code as long as there's been a Rightscorp.

So the facts are here. And there is no answer to the downloads. And that's what I told you when I first gave you --

spoke to you earlier today, that at the end of the day, the downloads are proof of infringements by their users, and they're also proof of their knowledge because every single one of those downloads has a TC number which tracks back to a specific notice which is, in fact, an accurate notice, as undoubtedly 99 percent of these notices were.

This was an operational system that worked effectively. They can point out all the hypotheticals in the world, but their expert and our expert both say the Rightscorp system does what it's supposed to do.

COURTROOM DEPUTY CLERK: Two minutes.

MR. BART: Two minutes?

It's able to engage in handshakes, do a torrent match, and send out notices. So at the end of the day, we have the downloads. We have the notices. They're all forensically accurate and the rest of this is a lot of noise. The claim about -- well, I've already addressed it in the -- the claim that because there are failed attempts means that -- you know, it's the old you knock on the door and nobody is home. You try to get a download as many times as you want. It doesn't prove that there's an error. He's drawing a correlation between a failed download attempt and an error in a notice, and that's just fallacious.

What happens here is, when they're able to get in touch with a user, they're able to confirm the torrent hash,

because the whole system works on the torrent hash. And when they're able to draw through an actual download, they do that.

So at the end of the day, we can actually sum up this case in the words of their own witnesses, because that's really where it comes up. Colin Bloch testified that back in the mid-2000s he advocated for a policy to apply punitive measures to anybody who infringed on Grande's network and that he would disagree with changing that policy.

In 2009, Lamar Horton testified that ABB took over and implemented a policy change, and under that new policy Grande could have received a thousand notices about a customer and it wouldn't have terminated that customer for copyright infringement.

The great Jeff Shockley, who was their one hope for dealing with anything, testified that after the policy change, he didn't even tell people to delete content. He said, *"It's your choice."*

And the people, when you saw the repeat infringer notices, the repeat infringer notice said, *"Delete all the content on your server and call us within two days to confirm that you're doing it."*

And then Fogle found out that users were up to their 54th notice and was seeing a broken process. And during that time, their own internal e-mails were talking about unauthorized downloads and distribution and not infractions.

And then you get to the final two pieces that I want to bring to your attention, which are -- if I can turn the page and they don't tell me to shut up -- are a quote from Mr. Horton, which I mentioned to you before, that *"If the jury finds that the infringements reflected in a notice actually occurred, then Grande was continuing to provide Internet service to users who were, in fact, guilty of infringement of which you had received copyright notices; isn't that correct?"*

"I suppose that's correct."

There are the elements of contributory infringement conceded on the record. And the final answer from Mr. Feehan saying that, *"If you knew that your users were stealing copyrighted content, that would be inconsistent with Grande's values" -- "would that be consistent with Grande's values?"*

"I don't believe so."

This is a case where they're looking for an opportunity to disregard any responsibility for the type of harm that only ISPs can address. Only ISPs can address piracy, and they're saying, Oh, no, not us. The record companies, you can suffer all the piracy you want as long as we can continue to pocket the money from repeat infringers, then we've done our business.

So -- can I have 30 seconds? Twenty seconds?

THE COURT: I'll give you ten seconds.

MR. BART: Okay. I was running around Lady Bird Lake

the other day and I saw the Willie Nelson statue. And I could swear he said to me, *Don't let these people get away with this. They're trampling on our rights here in the live music capital of America.*

Thank you.

THE COURT: All right. Ladies and gentlemen, you have now heard the closing arguments of both counsel. So it is now going to be your duty and responsibility to deliberate together, something I told you you couldn't do. Remember that when you do deliberate together, you have every right to discuss whatever it is that you feel is pertinent and appropriate about this case, as long as it's evidence from the case and it has relationship to the law.

If you've taken notes, remember those notes are yours and yours alone.

Now, I'm not going to make you go back and start your deliberations now. It's just too late in the afternoon. We're after 5:00, so I'm going to send you home. Now, the first thing that happens tomorrow morning is you come in and you select one of your number as your foreperson. When you've done that, you begin your deliberations. If somebody gets up and has to use the restroom or something like that, then you have to stop your deliberations until that person comes back. Okay? And you don't talk about the case, you know, when you walk home in the evening or anything of that kind. All right?

Now, let me give you a little bit about the schedule -- or my schedule so that you know. You are going to deliberate every day until you reach a verdict. Okay? That is the way it is. Because you're sequestered and so you need to do that. And as I told you, the Court is going to provide you lunch, so you do not need to bring lunch with you. I think they have snacks in there.

COURTROOM DEPUTY CLERK: They have good snacks.

THE COURT: They have good snacks? Probably better snacks than we have in San Antonio.

So we will have times when I won't be able to be here, like tomorrow morning. Like right when we're done, I have to get in the car and drive, unfortunately, in the traffic, the three hours it's going to take me to get to San Antonio instead of an hour and ten minutes. Because I have to be in court tomorrow morning, but I'm coming back just as soon as that's done. Okay? So I'll be here tomorrow afternoon.

I'll be here all Thursday. Right?

COURTROOM DEPUTY CLERK: Yes.

THE COURT: If you haven't reached a verdict by tomorrow afternoon, I'll be here Thursday, but I will not be here Friday, unfortunately. I'm not playing games. Unfortunately, a very, very dear friend of mine's daughter passed, and I have to go to the funeral. I will not pass that funeral up. She was a disabled child, let me put it that way.

I don't think you'd think very highly of me if I skipped this funeral. As soon as the funeral is done, I will come here.

What does this mean for you? If you reach a verdict during a period of time when I am gone, one of the other judges can accept the verdict and take your verdict. Okay? However, if there's a question -- and there really shouldn't be many questions because the jury instructions really cover all those answers. But if there are any questions, you're going to have to wait until I get back to get those questions answered. Okay? Because it would be an impossibility to bring another judge in. The lawyers would end up having to try to educate that judge, and by the time you got your answer, I'd be back here anyway. So it would be a fool's errand.

Obviously, if something happens on Friday and we need an answer right away, I can get on the telephone with a judge and discuss it with the lawyers, because the lawyers will be here, or some of them -- most of them -- somebody better be here. And then we will proceed that way. Okay? And then if you haven't reached a verdict by Friday, then you're going to come back Monday. Okay?

But then you got to watch out because we're running into Thanksgiving. All right? I don't think it's going to take you that long, but I don't control your deliberations. People ask me frequently, *Judge, did we deliberate long enough or not deliberate or too long?* I say, Look, there is no set

time to deliberate, a jury.

I had a case that was almost two months long and the jury came back with what I thought was a perfectly fine verdict, and so did the Appellate Court, by the way, in about three hours. Because they heard all the testimony. They had their minds made up. They looked again at the documents and they were ready to go. I've also had a trial that lasted three days, it took the jury two weeks to come back with a verdict. So I don't have any set time. Nobody is going to be saying, *Oh, they didn't deliberate long enough or they deliberated too long.* Nobody's -- that question doesn't get asked. Okay? So don't worry about that. Nobody is second-guessing you.

So go home tonight, get a good night's rest and come back at your normal time tomorrow. You'll start your deliberations and I should be back here by, I'm hoping, noontime. Doesn't matter to you because I don't come in your deliberations. Nobody gets to invade your deliberations. All right?

Okay. Thank you very much. You're excused. Have a good evening.

COURT SECURITY OFFICER: All rise for the jury.

THE COURT: Can you folks get in here by 8:30? We don't have anybody driving in from God knows where? No?

Where are you driving in from?

JUROR: Bertram.

THE COURT: Can you still get here at 8:30? Okay. We'll start at 8:30. That will give you a little more time. Thank you.

(5:15 p.m., the jury exits the courtroom.)

* * *

THE COURT: Please be seated.

All right, counsel. You heard me talk -- well, you knew. I told you ahead of time what my schedule was. I will be available by telephone. Priscilla will be here.

COURTROOM DEPUTY CLERK: I will be here.

THE COURT: She will be here and she can get me. I'm very responsive. I mean, unless I'm, you know, in the dentist chair at the moment, which is what I have to do first thing tomorrow morning. But then I'm going to run by court because there's some things I got to do and then I'm going to come right here. Traffic should be done, so I should be able to get here in an hour, little over an hour. I don't expect a verdict tomorrow. I'd be surprised, very surprised, but I've been surprised before.

But we might well get a verdict by Thursday afternoon. If not, then I won't be here until probably late Friday, so if a question comes in or something like that, we'll just have to hold it. If this service goes on long enough, I might not come up at all, if it looks like the jury is not going to reach a verdict, there's no sense. But we'll play it by ear. I'll do

what is necessary to get back here. I mean, if we get a verdict -- it looks like a verdict is coming in at 4:00, and I get out of the service at 2:30 or something like that, I'll hop right in the car and come.

Lastly -- I always say this now because at the end of the case when a verdict comes in, one side is very happy to listen, the other side is not happy to listen. I want to thank each and every one of you for your many courtesies during this case. Really, I told my law clerk, I said, *"You have had a wonderful opportunity"* -- and she'll verify this -- *"a wonderful opportunity to see superb lawyers in action in a federal courtroom."* And, you know, that's not something that young lawyers get to see very often. I said, *"If you joined one of these gentlemen or lady's law firms, you'd be doing doc review somewhere in the basement,"* like I did when I first started. And here she gets this opportunity to see really, really fine lawyers. And it was a real pleasure to watch you in action, because you really are very good lawyers. And in spite of the fact that we had a few little instances where people got a little aggravated, that's understandable. By and large, the attorneys in this case were, in fact, a hundred percent of the time professional, ethical, and responsible.

And I can't tell you that today in the federal courtroom -- you know, when I was a young lawyer, if you did anything squirrely in the federal courtroom, you were in big,

big trouble, and nobody would dare do it.

That isn't the way it is today. I go to meetings with other federal judges from all over the country, D.C. I've got Royce Lamberth is one of my closest friends, he's a federal judge in D.C. And they tell me stories, hair-raising stories, stuff that goes on in their courtrooms that would just shock you. And when I get really fine lawyers in who do a good job for their client and do it in a professional way and are cordial, what a joy that is for me. And what a great experience for her.

So I have a rule, 15 minutes. You need to be within 15 minutes of the courthouse at all times with the exception, of course, at lunch. You're entitled to go have lunch. They're going to be provided lunch. They'll have about an hour for lunch, from 12:00 to 1:00, so you've got 15 minutes on either side of that. Okay? The reason for that, of course, is if we do get a question, and I'm here, we want to get it answered. And we don't want to go lofting off trying to find people who are on the other side of Lake Austin or something doing God knows what. I think I told you the story -- maybe I didn't -- of two --

COURTROOM DEPUTY CLERK: You have.

THE COURT: That may be the only story I haven't told you.

I had two lawyers -- this was a criminal case now. It

was a major case. This was a state senator that was under indictment, it was a very powerful man. And we had a long trial and these two characters decided, it was a Friday, that, eh, they're not going to get a verdict. So they jump -- one of them goes on Aloha Airlines, the other one goes on Hawaiian airlines. They get a 4:00 flight, and they're off to the outer islands. In the meantime, the jury comes in at 4:30. And, you know, all the conspiracy theories, you know, were like swirling around the courthouse. Why has the judge sealed the verdict? Well, we couldn't find them. I mean, literally. We couldn't find the lawyers. And when somebody came in and told me, Judge, one of them is on the Big Island and the other one is over in Maui, I said, Holy mackerel.

So, I don't think we have that problem. Nobody here is going to go to the Big Island or Maui in between. Okay. You all don't have to be available, obviously, as long as somebody is available.

Now, do all of you intend to stay or -- you're going to send some of your staff back, I would assume?

MR. BROPHY: I think that's probably true, Your Honor.

THE COURT: Yeah, because that starts to get very expensive to just have people sitting around here. There aren't going to be major legal issues decided here, but that's entirely up to you. That's not my call. The courthouse will be locked at night, but it will be open for your use during the

day. Okay?

Make sure that's right.

COURTROOM DEPUTY CLERK: That's right.

THE COURT: Make sure they can come in here. So if you need to work or you need to do something. Aren't there attorney rooms here?

COURTROOM DEPUTY CLERK: They've been working in an attorney work room.

THE COURT: Okay. Well, let me not keep you any longer. Have a nice evening, and I will see you at some point. I don't know when. I will see you at some point.

COURT SECURITY OFFICER: All rise.

(5:24 p.m.)

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date signed: November 28, 2022

/s/ Angela M. Hailey

Angela M. Hailey, CSR, CRR, RPR, RMR
Official Court Reporter
262 West Nueva Street
San Antonio, Texas 78207
(210)244-5048